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No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

MARVIN D. CUTRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

P. CHRISTIAN HAGUE, Esquire*
FRANK G. SALPIETRO, Esquire

MEYER, UNKOVIC & SCOTT
1300 Oliver Building
Pittsburgh, PA 15222
(412) 456-2800

Attorneys for Petitioners

BRIAN G. BRUNSVOLD, Esquire

FINNEGAN, HENDERSON, FARABOW, GARRET & DUNNER
1300 I Street, N.W., Suite 700
Washington, D.C. 20005-3315
(202) 408-4000

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether a United States government agency can deny full-time governmental employees benefits under the Annual and Sick Leave Act, 5 U.S.C. §6301, *et seq.*, by administrative fiat which directly contravenes a clear and unambiguous statute of the United States Congress.

2. Whether benefits vesting under the Annual and Sick Leave Act, 5 U.S.C. §6301, *et seq.*, constitute an entitlement or property right such that the unilateral denial of those benefits by the government is an improper taking of property in violation of the due process clause of the Constitution of the United States.

LIST OF PARTIES

The parties to the proceeding below and before this Court are:

1. Marvin D. Cutright, an individual.
2. The United States of America.

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MARVIN D. CUTRIGHT respectfully prays that a Writ of Certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on January 14, 1992 (Rehearing denied on March 5, 1992).

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Federal Circuit (Appendix A, *infra*) was filed on January 14, 1992, and is reported at 953 F.2d 619. The Opinion and Order of the United States Claims Court granting Summary Judgment in favor of Petitioner (Appendix B, *infra*) is reported at 21 Cl. Ct. 490 and was entered on October 3, 1990.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Federal Circuit were entered on January 14, 1992. Rehearing was denied by that court on March 5, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is timely filed with the Court under 28 U.S.C. § 2101(c) and Supreme Court Rules 13.1 and 13.4.

STATUTES INVOLVED

The relevant statutory and Constitutional provisions are:

(a) The Annual and Sick Leave Act, as amended, 5 U.S.C. § 6301, *et seq.*;

(b) 5 U.S.C. § 2105;

(c) *U. S. Const.*, Art. I § 1;

(d) *U. S. Const.*, Amend. V.

Pertinent portions of the statutory and Constitutional provisions are reproduced at Appendix C, *infra.*

STATEMENT OF THE CASE

On March 15, 1988, Petitioner Marvin D. Cutright ("Cutright" or "Petitioner") filed an action against Respondent, The United States ("United States" or "government"), in the United States Claims Court, seeking benefits under the Annual and Sick Leave Act, 5 U.S.C. § 6301, *et seq.* (hereinafter "Leave Act"). Jurisdiction was proper in the Claims Court pursuant to 28 U.S.C. § 1491.

The action was brought individually and on behalf of all other government employees similarly situated, including bankruptcy judges, United States magistrates, court reporters, law clerks, judicial secretaries, magistrates' secretaries and magistrates' clerical assistants.

Petitioner Marvin D. Cutright was appointed as a federal court reporter by the Honorable Roby C. Thompson, Chief District Judge of the United States District Court for the Western District of Virginia, in August, 1958. From the commencement of his employment until his retirement from federal service in October, 1986, Mr. Cutright worked continuously and faithfully as a full-time reporter for the courts. Mr. Cutright worked at least

5 days per week, 8 hours per day on behalf of the government. Indeed, his pay stubs indicate that he received a salary for working full-time (40 hours per week). Furthermore, Mr. Cutright received longevity increases in pay which, according to the *Court Reporter's Manual* (issued by the Administrative Office of United States Courts) are only payable to full-time employees.

Finally, upon retirement, Mr. Cutright submitted standard form 1150 to the government requesting Leave Act benefits. That form was signed by the Honorable Maurice B. Cohill, Chief Judge of the United States District Court for the Western District of Pennsylvania, wherein Judge Cohill stated that Mr. Cutright was a full-time employee. (See Appendix D, infra). Despite this clear evidence of Mr. Cutright's full-time status, the government denied him Leave Act benefits.

Along with his Complaint, Mr. Cutright filed a Motion to Certify the Case as a Class Action. After briefing and hearing argument, the United States Claims Court, per the Honorable Bohdan Futey, denied Mr. Cutright's Motion for class certification, ruling that entitlement to benefits under the Leave Act would vary for different types of government employees.

The case proceeded through discovery, after which Mr. Cutright filed a Motion for Summary Judgment contending that he was entitled to Leave Act benefits as a matter of law because (1) the government admitted that the Leave Act applies to all federal employees except those specifically excluded by statute, (2) federal court reporters are not a specifically excluded class, and (3) the undisputed facts of record established that Mr. Cutright

worked as, and was paid as, a full-time employee of the government from September, 1958 until he retired in October, 1986.

The government filed a Cross Motion for Summary Judgment, contending that court reporters were automatically excluded from the Leave Act because they had not been assigned a "regular tour of duty" prior to 1984, even though the "regular tour" exception applied only to "part-time" employees by the express terms of the statute. 5 U.S.C. § 6301(2).

After oral argument, the Claims Court entered an Order granting, in part, Mr. Cutright's summary judgment motion and denying the government's motion. The court ruled that Marvin D. Cutright was a full-time employee during his tenure as a court reporter, and thus was not excluded by virtue of the government's failure to assign a "regular tour of duty" since that requirement applied only to part-time employees. Mr. Cutright's sick leave was completely restored for purposes of calculating his retirement annuity. His annual leave, however, was restored only to the extent of 240 total hours, rather than his total accumulated hours, despite the court's ruling that the government committed "administrative error" which would allow annual leave to exceed this ceiling.[1]

Despite general agreement with the Claims Court's rationale in awarding Leave Act benefits to Marvin

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[1] Section 6304(d)(l) of the Leave Act directs that annual leave lost because of administrative error shall be restored in full to an employee without regard to the normal limitation of 240 hours annual leave set forth in § 6304(a).

Cutright, Mr. Cutright appealed the Claims Court's denial of class certification and the court's erroneous limitation on annual leave benefits.[2] The government filed a cross-appeal, contending that the Claims Court erroneously entered summary judgment in favor of Mr. Cutright.

On January 14, 1992, the United States Court of Appeals for the Federal Circuit reversed the Claims Court's ruling for Mr. Cutright in its entirety, holding that Mr. Cutright, as a federal court reporter, was a "part-time employee" who was excluded from Leave Act coverage because he did not have an established "regular tour of duty." (See Appendix A, *infra*). Petitioner's Request for Re-hearing was denied on March 5, 1992.

This Petition for Writ of Certiorari followed.

REASONS FOR GRANTING THE WRIT

The Leave Act was enacted by Congress to create a comprehensive system of regulation and administration of leave accrual, accumulation and payment to federal employees. Entitlement to Leave Act benefits is afforded to the vast majority of federal workers. In permitting a United States government agency (the Administrative Office of United States Courts), by administrative fiat, to unilaterally redefine the terms and conditions of the Leave Act to exclude an entire class of federal employee from coverage without Congressional mandate, the

[2] Jurisdiction in the United States Court of Appeals for the Federal Circuit was proper pursuant to 28 U.S.C. § 1295(a)(3).

United States Court of Appeals for the Federal Circuit has created a dangerous precedent that casts doubt not only upon the efficacy of the Leave Act, but also on the ability of one to rely upon the clear and unambiguous legislative intent of Congress.

Furthermore, the holding of the Federal Circuit permits the government to deprive Petitioner of vested property rights in violation of the Constitution of the United States and rulings of this Court, in that Leave Act benefits were part of Cutright's contract of employment with the government.

The lower court's ruling also ignored clear judicial and extra-judicial admissions that the Administrative Office had improperly denied Leave Act benefits to certain federal employees, including court reporters.

This case thus presents an important question of federal law which has not been, but should be, settled by this Honorable Court.

I. FEDERAL COURT REPORTERS ARE EMPLOYEES ENTITLED TO SICK LEAVE AND ANNUAL LEAVE BENEFITS UNDER THE CLEAR AND UNAMBIGUOUS PROVISIONS OF THE ANNUAL AND SICK LEAVE ACT.

For purposes of the Leave Act, an "employee" is specifically defined as follows:

> "[E]mployee" means –
>
> > (a) An employee as defined by § 2105 of this title; and

(b) An individual first employed by the government of the District of Columbia before October 1, 1987;

but does not include –

(i) A teacher or librarian of the public schools of the District of Columbia;

(ii) A part-time employee who does not have an established regular tour of duty during the administrative work week;

(iii) A temporary employee engaged in construction work at an hourly rate;

(iv) An employee of the Panama Canal Commission when employed on the Isthmus of Panama;

(v) A physician, dentist or nurse in the Department of Medicine and Surgery, Veterans' Administration;

(vi) An employee of either House of Congress or of the two Houses;

(vii) An employee of a corporation supervised by the Farm Credit Administration if private interests elect or appoint a Member of the Board of Directors;

(viii) An alien employee who occupies a position outside the United States, except as provided by § 6310 of this title;

(ix) A "teacher" or an individual holding a "teaching position" as defined by § 901 of Title 20;

(x) An officer in the Executive Branch or in the Government of the District of Columbia who is appointed by the President and

> whose rate of basic pay exceeds the highest rate payable under § 5332 of this title;
>
> (xi) An officer in the Executive Branch or in the Government of the District of Columbia who is designated by the President, except a Postmaster, United States Attorney, or United States Marshall;
>
> (xii) An Officer in the Legislative or Judicial Branch who is appointed by the President.
>
> Notwithstanding clauses (x) – (xii) of paragraph (2), the term "employee" includes any member of the Senior Foreign Service where any Foreign Service Officer (other than a member or officer serving as a Chief of Mission or in a position which requires appointment by and with the advice and consent of the Senate, and any member of the Foreign Service commissioned as a Diplomatic or Consular Officer, or both, under § 312 of the Foreign Service Act of 1980).

5 U.S.C. § 6301(2).

An "employee . . . as defined by § 2105," 5 U.S.C. § 6301(2)(A), includes, in relevant part, any officer or individual who is:

> (1) appointed in the Civil Service by one of the following acting in an official capacity –
>
> * * *
>
> (d) an individual who is an employee under this Section;
>
> * * *

> (2) Engaged in the performance of a Federal function under authority of law or an executive; and
>
> (3) subject to the supervision of an individual named by Paragraph (1) of this subsection while engaged in the performance of the duties of his position.

5 U.S.C. § 2105(a). The government does not dispute that an appointment by a federal judge meets the definition of "employee."

The government contends that Petitioner, Marvin D. Cutright, as well as other official court reporters, was not covered by the Leave Act until January, 1984, because he was not assigned a "regular tour of duty during the administrative work week" until that time. *See* 5 U.S.C. § 6301(2)(B)(i). This conclusion is erroneous and contrary to the law. The general definition of an "employee" under § 2105 requires that only three criteria be met: (1) that the individual or officer be appointed by a federal official, (2) that the individual acts or engages in the performance of a federal function, and (3) that the individual is subject to the supervision of a federal official while performing his duties. While this Honorable Court has not had occasion to address the clear and unambiguous nature of the statutory definition, both of the courts below – the Claims Court and the United States Court of Appeals for the Federal Circuit – have previously indicated the clear and unambiguous nature of § 2105.

In *Costner v. United States*, 229 Ct. Cl. 87, 665 F.2d 1016 (1981) the court stated:

> [I]t is *obvious from the statutory language* that there are three elements to the definition – an

> appointment of an authorized federal employee or officer, performance of a federal function, and supervision of a federal employee or officer – and that they are cumulative. A person must satisfy each requirement.

665 F.2d at 1020 (emphasis supplied).

Similarly, in *Horner v. Acosta*, 803 F.2d. 687 (Fed. Cir. 1986), the court, in addressing the issue of whether several employees were members of a special naval intelligence unit, opined:

> Here, the *Congress spoke specifically by enacting a provision expressly covering the matter at issue. It defined employee.* Thus, even if the [Federal Personnel Manual Supplement] were accorded regulation status, it has been made obsolete by the enactment of the statutory definition of employee.

803 F.2d. at 695 (emphasis supplied).

Along the same lines, § 6301 of the Leave Act, 5 U.S.C. § 6301, is very explicit in setting forth categories of federal employees which are not to be included in the Leave Act. Official court reporters are not explicitly excluded from coverage.

The government contends that Marvin Cutright is excluded from coverage under the Leave Act because he was not placed on a "regular tour of duty" as required by § 6301(2)(B)(ii) of the Leave Act. The "regular tour of duty" exception applies only to part-time employees, according to the explicit language of section 6301. Therefore, if an employee works full-time for the government, the "regular tour of duty" exception becomes irrelevant.

In *Cain v. United States*, 77 F. Supp. 505 (N.D. Ill. 1948), a retired Circuit Judge's secretary brought an action under the Tucker Act, 28 U.S.C. § 1346 and § 1491, to receive a lump-sum payment for her accrued annual leave. The government relied upon a Comptroller General's report that the duties of secretaries and law clerks to United States judges consume only a portion of their time and they are normally in a non-work status for extended periods, thus making them part-time employees (the precise claim being made by the government and the rationale adopted by the court below in this matter). In rejecting this defense, the District Court for the Northern District of Illinois noted that the Leave Act provides that "all civilian employees of the United States," regardless of their tenure, are entitled to receive the benefits of the Leave Act, with certain *specific* exceptions. 77 F. Supp. at 507. The Court, therefore, held:

> [P]laintiff as secretary to one of the United States judges, was such a civilian employee and does not fall within any of the enumerated exceptions. *The language used in the Act is plain, clear and unequivocal,* and admits of but one interpretation. Had Congress intended to except secretaries and law clerks to United States judges from its provisions, I believe it would have included them among the enumerated exceptions. . . . *Congress . . . should make the exception, not the Comptroller General or the Courts.*

Id. at 507-508 (emphasis supplied).

The reasoning in *Cain* was adopted by the Court of Claims in the case of *Sauer v. United States*, 173 Ct. Cl. 642, 354 F.2d 302 (1965). In that case, an auditor of the Court of Claims, upon his retirement, sought a lump-sum distribution for accumulated leave. The court specifically found that the Leave Act applied to judicial branch personnel:

> Defendant denied the Plaintiff's position in the judicial branch was covered by the Annual Leave Act of 1936. We cannot accept the contention of Defendant. The 1936 Act applied, *with certain exceptions* to "all civilian officers and employees of the United States. . . . " None of the exceptions is [sic] pertinent here. Therefore, we conclude that the plaintiff's position as auditor for this Court was within the coverage of the 1936 Act.

354 F.2d. at 305. (emphasis supplied).

Referring to *Cain*, the court continued:

> Neither in *Cain* nor in the present suit was . . . the government able to present any *statutory authority* for the proposition that employees of the federal judiciary were outside of the scope of the. . . . Act and related provisions or that, regarding such employees, a separate leave system existed.

354 F.2d. at 305, 306, fn.8. (emphasis supplied).

As with the federal judicial employees involved in *Cain* and *Sauer*, Marvin Cutright and federal court reporters fit within the Leave Act's clear definition of "employee." Although the Act includes specific exceptions, none of those exceptions pertain to a full-time court

reporter. The Defendant in this case can point to no statutory authority standing for the proposition that federal court reporters are specifically excluded from Leave Act coverage. Marvin D. Cutright was, therefore, entitled to receive lump-sum leave payments under the Leave Act for his employment from August, 1958 through October, 1986.

Indeed, the legislative history of the Leave Act and the relatively recent amendments to the Act further support Petitioner's position. In 1978, Congress amended § 6301 of the Leave Act to add Clause (xiii) to subsection (2)(B), excluding "any officer of the Legislative or Judicial branch who is appointed by the President" from Leave Act coverage. Once again, Congress had a clear opportunity to explicitly exclude court reporters. Instead, it chose only to exclude judicial employees who were appointed by the President. The *express* Congressional purpose of the 1978 amendment was to "clarify existing law by specifically excepting all Presidentially appointed officers in the Legislative and Judicial branches from the annual and sick leave provisions of Title 5 of the United States Code." *Legislative History of P.L. 95-519*, 92 Stat. 4160. In expounding upon this general statement of purpose, the Congress went on to state:

> The annual and sick leave provisions contained in Subchapter I of Chapter 63 of Title 5, United States Code, *apply to the vast majority of federal employees. The provisions do not apply to elected officials such as members of Congress, or* ***to certain specific categories of appointed employees.*** Included within the *specific* statutory exceptions are employees of either House of Congress and

> officers of the executive branch who are appointed by the President. The exception of executive branch officers is based on the fact that such officers never completely divest themselves of their responsibilities and actually are on duty at all times.[3]

Id. (emphasis supplied).

Therefore, in addition to judicial rulings regarding the unambiguous language of the Leave Act, Congress has recognized that there are very limited, specific exceptions to Leave Act coverage. If Congress had intended to exclude court reporters, it had the ability and opportunity to do so in 1978. Its failure to create a specific exclusion is strong evidence supporting coverage of federal court reporters.

Indeed, the government's blatant attempt to override a clear enactment of Congress is a violation of the Constitution. Article I, § 1 of the Constitution of the United States reads:

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

U.S. Const. Art. I, § 1. The lawmaking powers entrusted to Congress by the founders of this nation must be exercised by Congress alone. *Touby v. United States*, ___ U.S. ___, 111 S. Ct. 1752 (1991); *Youngstown Sheet & Tube Company v.*

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[3] The plain meaning of a statute's language, enlightened by its context and contemporaneous legislative history, can control the determination of legislative purpose. *Edwards v. Aguillard*, 482 U.S. 578, 594, 107 S. Ct. 2573, 2583 (1987).

Sawyer, 343 U.S. 579, 72 S. Ct. 863 (1952). The will of Congress, as unambiguously expressed in a properly enacted statute, cannot be amended or altered by regulation or administrative fiat. *United States v. Maxwell*, 278 F.2d 206 (8th Cir. 1960).[4] By attempting to rewrite the Leave Act by adding an exception which does not exist, a judicial branch agency – the Administrative Office of the United States Courts – is attempting to legislate in violation of Article I of the United States Constitution.

In fact Respondent, despite its present contrary position in this matter, has recognized the clarity of the Leave Act statute. In a memorandum dated May 18, 1983, William M. Nichols, General Counsel to the Administrative Office of the United States Courts, discussed the applicability of the Leave Act to certain officers and employees in the judicial branch. (*See* Appendix F, *infra*). The memorandum was written to restate the views of the General Counsel to the Director of the Administrative Office with regard to the applicability of the Leave Act to United States Magistrates, Bankruptcy Judges and the personal staff of Circuit and District Court judges (which includes law clerks, court reporters, secretaries and the like). The memorandum points out that under regulations that existed in 1983, Magistrates and Bankruptcy judges were automatically excluded from the Leave Act and judge's personal staff were included or excluded based upon the

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[4] There is a distinction between the power to make a law, which necessarily involves the discretion as to what it will be, and confirming authority as to its execution, to be exercised under and pursuant to the enacted law. *E.g., Wayman v. Southard*, 23 U.S. 1, 10 Wheat. 42 (1825); *Crain v. First National Bank of Oregon*, 324 F.2d 532 (9th Cir. 1963).

discretion of each individual judge. The General Counsel expressly stated that: *"[I]t is clear in our view that this procedure is improper under the law."* He then went on to recommend that the regulations be changed to place secretaries and other judicial employees (which would include court reporters) under the Leave Act. He warned, however, that mere prospective application of the Leave Act was not supportable legally and that it ran the "risk that current and former employees could, as had occurred in the past, successfully sue for their leave benefits." (Appendix F, pages 52a-53a). Mr. Nichols specifically cited *Cain, supra,* and its finding that exclusions in the Leave Act are to be left specifically to Congress, and not to the courts. *Id.* at 54a-56a.

Furthermore, in a memorandum dated November 27, 1987, the Director of the Administrative Office of the United States Courts stated that the Leave Act *"clearly places all employees of the judicial branch under the provisions of the law* except for judges appointed by the President." (Appendix G, page 61a). Finally, on August 10, 1979, Carl H. Imlay, acting on behalf of the government recommended, apparently because of the clarity of the Leave Act, that all judicial employees (with the exception of those appointed by the President) be included in the Leave Act. (Appendix H, page 64a).

The undisputed facts in the record show that Marvin D. Cutright was appointed as a federal court reporter by the Honorable Roby C. Thompson, Chief District Judge of the United States District Court for the Western District of Virginia, in August, 1958. (See Appendix I, *infra,* page 68a). From August 30, 1958 until his retirement from federal service in October, 1986, he worked as a full-time

reporter for the courts, and he worked in excess of 40 hours per week on behalf of the government (Appendix J, *infra*). His schedule required him to be available at all times during the working day. His paychecks were for a 40-hour work week. *Ibid.*

Additionally, the *Guide to Judiciary Policies and Procedure: Court Reporters' Manual,* published by the Administrative Office, in Chapter V, Paragraph C, states the Judicial Conference policy on salary:

> All official court reporters who have satisfactorily completed ten years of *full-time* service as a court reporter for a United States District Court shall receive the starting salary established by the Judicial Conference of the United States, plus a 5% longevity increase over the starting salary.

The Petitioner was in fact paid the longevity increase as well as other merit increases. (Appendix J, *infra,* page 73a).

Perhaps most telling is the fact that, at the time Mr. Cutright retired, the Honorable Maurice B. Cohill, Jr., Chief Judge of the United States District Court for the Western District of Pennsylvania, signed Mr. Cutright's Standard Form 1150 (entitled "Record of Leave Data"). That form clearly states that "employee has been *employed full-time* since 8-30-58." (Appendix D, *infra*) (emphasis supplied). The signature of Judge Cohill and the statement made in Standard Form 1150 is unchallenged by the government by anything in the record.

The record is replete with admissions by Respondent of Mr. Cutright's full-time status. For example, in addition to the memoranda set forth above (Appendices F and

G, *infra*), on August 10, 1979 the government stated that, in light of the 1978 amendment to the Leave Act (discussed, *supra*) it was required that the government "treat eve y other category of judicial officer and employee *without exception* as covered by the [Leave Act]." (Appendix H, *infra*, page 64a). (emphasis supplied). In its Answer to Interrogatories, the government admitted that it is not contending that Mr. Cutright was excluded from Leave Act coverage because he was a Presidential employee. (*See* Appendix K, *infra*, Answer to Interrogatories No. 1). Nor does the government contend that Mr. Cutright was excluded from Leave Act coverage because he was a "temporary employee." (*Ibid.*, Answers to Interrogatories No. 2). Most importantly, the government explicitly stated it was not contending that Marvin D. Cutright was excluded from Leave Act coverage because he was a *part-time employee*. (*Ibid.*, Answer to Interrogatories No. 4).

The only exception to the Leave Act relied upon by the government – the "regular tour of duty" exception – is inapplicable. That provision deals only, by its explicit terms, with part-time employees.

It is respectfully submitted that the court below and the government improperly denied Leave Act benefits to Marvin Cutright (and by the rulings denied Leave Act benefits to some other court reporters) by ignoring the record of Mr. Cutright's full-time status.

As legal support for its holding, the court below points to no specific language in the Leave Act statute to support the government's position. Instead, it points to

several Comptroller General opinions which would deny Leave Act coverage to court reporters, ostensibly on the basis of the reporters' ability to perform private work. (Appendix A, *infra*, page 6a).[5]

Those opinions should not have been dispositive of the present matter. First, none of the cases specifically involved the Petitioner. Second, Comptroller General decisions regarding Leave Act coverage are not binding on the courts. As one court has noted, "the Comptroller General is not a law officer. He does not render legal opinions." *United States Ex Rel Brookfield Construction Company, Inc. v. Stewart*, 234 F. Supp. 94, 99, *affirmed*, 339 F.2d 753 (D.C. Cir. 1964). The reasoning of the court in *Brookfield Construction* was adopted by the Third Circuit Court of Appeals in *Ameron, Inc. v. United States Army Corp. of Engineers*, 787 F.2d 875 (3d Cir. 1986). In that case, the Court of Appeals affirmed the granting of an injunction to stay the bidding process while the agency and the Comptroller General reviewed a bidder's protest. The court stated, however, that "the power of the Comptroller General in rendering his decision is limited to a *recommendation* that the agency . . . terminate or re-bid the contract. . . . The only affirmative power provided the Comptroller General is to award a prevailing protester its bid." 787 F.2d at 789.

In any event, this Honorable Court has ruled that a court should decline to follow the Comptroller General where the opinion rendered goes beyond the scope of a

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[5] The lower court also relied upon numerous facts *dehors* the record, which will be addressed more fully *infra*.

statute. In *Miguel v. McCarl*, 291 U.S. 442, 54 S. Ct. 465 (1934), this Court held that a retired enlisted man qualified for retirement pay and allowances despite a contrary decision of the Comptroller General. The Court noted that "statutory provisions so clear and precise do not require construction . . . the language is conclusive. *There can be no construction where there is nothing to construe.*" 291 U.S. at 453. (emphasis supplied). The *Cain* and *Sauer* cases, *supra*, are also compelling. In both of those cases, the Comptroller General denied a claim made pursuant to the Leave Act. In *Cain*, the Comptroller General stated that judicial secretaries should be considered "part-time" employees for purposes of the Leave Act (the same determination made here). The court overruled the finding. The rejection of the opinion was based on the clear and unambiguous language of the statute.

Indeed, the respondent has acknowledged via a memorandum dated May 20, 1982, the impropriety of relying upon the Comptroller General opinions:

> Strictly speaking the 1948 [*Sauer*] court decision should have been recognized as superseding the Comptroller General's administrative opinions; nevertheless, the optional practice [of letting each individual judge decide on Leave Act coverage for his staff] has continued.

(Appendix E, page 42a).

By unilaterally denying Leave Act coverage to Petitioner Marvin D. Cutright, despite the clear and unambiguous language of the Leave Act, the judicial authority interpreting that language, and the admissions of record made by the government, the Respondent has sent a

message to federal employees that their retirement benefits are not a matter of entitlement, but a matter of administrative interpretation, which can be granted or taken away at the whim of a government agency despite Congressional mandates to the contrary. This situation should not be tolerated by this Honorable Court.

II. MARVIN D. CUTRIGHT HAS BEEN DEPRIVED OF PROPERTY WITHOUT DUE PROCESS OF LAW.

It is fundamental that no person shall be deprived of life, liberty or property without due process of law. *U.S. Const.*, Amend. V. The government, however, by refusing to pay Marvin Cutright for annual and sick leave which was earned over his career, has violated this precept.

This Honorable Court discussed the concept of "property interests" in the seminal case of *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701 (1972):

> The [Constitution's] procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits. These interests – property interests – may take many forms.
>
> * * *
>
> Thus, the Court has held that a person receiving welfare benefits under statutory and administrative standards defining eligibility for them has an interest in continued receipt of those benefits that is safeguarded by procedural due process. *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287.

> Certain attributes of "property" interests protected by procedural due process emerged from these decisions. To have a property interest in a benefit, a person must clearly have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules and understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Thus, the welfare recipients in *Goldberg v. Kelly, supra,* had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them.

408 U.S. at 576-77; 92 S. Ct. at 2708-09.

In *Zucker v. United States,* 758 F.2d 637 (Fed. Cir. 1985), *cert. den.* 474 U.S. 842, 106 S. Ct. 129 (1985), Appellants (retirees under the Civil Service Retirement Act), sought to challenge the constitutionality of a statute that modified the cost of living adjustment for civil service annuitants. While the court concluded that the due process rights of the retirees were not violated by a duly enacted congressional amendment, the court did note

that retirees of government employment may have a protected property interest when they are entitled to immediate payment under *pre-existing law.* 758 F.2d at 639. Clearly, if welfare recipients have property rights in welfare benefits, Mr. Cutright has a vested property right in his Leave Act benefits as a faithful full-time employee of the courts.

As set forth at length, *supra,* Congress clearly intended court reporters to fall within the broad definition of "employee" as defined by 5 U.S.C. § 2105. It is also clear that, once it is determined that an individual is an "employee" for purposes of Leave Act coverage, Congress intended to create an entitlement or property right to benefits. Section 6303(a) of the Leave Act states explicitly that an "employee is *entitled* to annual leave with pay which accrues as follows. . . . " 5 U.S.C. § 6303(a) (emphasis supplied). Similarly, Section 6307 of the Act states that "an employee is *entitled* to sick leave with pay which accrues [according to a specific formula]." 5 U.S.C. § 6307(a) (emphasis supplied).

By unilaterally refusing to recognize Petitioner's entitlement to annual and sick leave benefits, the government violated his constitutional right to due process. This court should not tolerate such a violation.

III. THE COURT BELOW SHOULD NOT HAVE RELIED ON FACTS DEHORS THE RECORD IN RULING THAT PETITIONER WAS A "PART-TIME" EMPLOYEE WITH NO "REGULAR TOUR OF DUTY" TO EXCLUDE HIM FROM COVERAGE UNDER THE ANNUAL AND SICK LEAVE ACT.

The standard of review by this Court in considering whether or not the Court of Appeals for the Federal

Circuit properly entered summary judgment in favor of the government is to determine if there were any facts lacking to support the Federal Circuit's findings. The party seeking summary judgment has the burden of identifying portions of the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, which demonstrate entitlement to summary judgment. *Celotex Corporation v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986). The party opposing the motion must likewise set out, by affidavit or otherwise, specific facts of record as to what evidence would be offered at trial so as to preclude the entry of summary judgment. *See Sweats Fashions, Inc. v. Pannill Knitting Company*, 833 F.2d 1560 (Fed. Cir. 1987). General assertions of factual issues are not enough. *Chemical Engineering Corporation v. Essef Industries, Inc.*, 795 F.2d 1565 (Fed. Cir. 1986). If facts are to be considered by the court, they must be placed of record and be presented to the court by affidavit or other verified form. Otherwise, the facts cannot be considered. *E.g., Larry v. White*, 929 F.2d 206 (5th Cir. 1991); *Barmag Barmer Maschinenfabrik A G v. Murata Machinery Ltd.*, 731 F.2d 831 (Fed. Cir. 1984). Any doubt must be resolved in favor of the non-moving party (in this case, Marvin Cutright). *Lujan v. National Wildlife Federation*, 497 U.S. 871, 110 S. Ct. 3177 (1990).

The matters of record which were considered by the Claims Court in deciding the cross-motions for summary judgment were the affidavits of Marvin D. Cutright and attached exhibits, Defendant's Responses to Plaintiff's First Set of Interrogatories, Defendant's Responses to Plaintiff's First Request for Admissions and the pleadings. The Respondent filed one affidavit in opposition to

Mr. Cutright's Motion for Summary Judgment (that of Catherine Martrano, the clerk of courts). That affidavit does not contain any facts that contradict Mr. Cutright.

The Claims Court, in granting summary judgment in favor of Marvin Cutright, used the only evidence of record to determine that Mr. Cutright was a full-time employee. On the contrary, the Court of Appeals for the Federal Circuit relied upon evidence *dehors* the record. For example, the Circuit Court claimed that Mr. Cutright was "free to take work from independent sources." It also claimed that Mr. Cutright could record depositions for private attorneys. It also contended that the District Court did not require that Mr. Cutright work at the courthouse for 40 hours each week and that "he came to the court only when his services were required." (Appendix A). Not only was there no evidence of this, but Mr. Cutright's affidavits state that he in fact worked at least 40 hours each week. (Appendix I and Appendix J). The three-member panel of the court below then went on to cite "facts" set forth in the opinion of the Claims Court that Mr. Cutright had an uncertain schedule and was subject to the needs of the court to conclude that Mr. Cutright "was a part-time employee without a regular tour of duty from 1958 to 1984." (*Id*).

Even if, *arguendo,* Petitioner Marvin Cutright could take depositions outside his court duties, it is respectfully submitted that what an employee does on his own time is his own business and is not proscribed. *See* 28 U.S.C. § 753. By virtue of his full-time employment with the federal government and his receipt of a full-time salary, Mr. Cutright was obligated to perform services for the government, and indeed performed full-time services for the government. This does not mean, however, that his

"free time" should be restricted, or that the productive use of that "free time" should enable the government to circumvent a clear entitlement to Leave Act benefits.

Furthermore, the lower court improperly relied upon the case of *Lemily v. United States*, 190 Ct. Cl. 57, 418 F.2d 1337 (1969) in granting the government's Motion for Summary Judgment.[6] In *Lemily*, it was clear that the Plaintiffs were "hired as temporary employees and paid at an hourly rate on a when-actually-employed basis." 418 F.2d at 1338. The sole issue in *Lemily*, as noted by the Court of Claims, was whether or not the Plaintiffs, as *temporary employees*[7], were entitled to annual and sick leave benefits accorded to government employees generally.

The fact that in *Lemily* the Plaintiffs were temporary employees and paid by the hour on a "when-actually-employed" basis (as opposed to a salary) is alone sufficient to distinguish that case from Marvin Cutright's situation, since Mr. Cutright was a full-time employee paid an annual salary. The record is clear that Mr. Cutright, both prior to 1984 and after 1984, was paid a fixed salary because of the fact that he was a permanent,

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[6] Neither party cited *Lemily* in the original briefs in support of motions for summary judgment. The case was raised for the first time by the Claims Court at oral argument. A review of the facts of the case make it apparent why neither Mr. Cutright nor the government cited *Lemily* in their respective briefs, and the Claims Court distinguished it from the facts of Mr. Cutright's case (Appendix B, page 19a).

[7] As set forth *supra*, the government specifically admitted that it was not contending that Marvin Cutright was a temporary employee. (Appendix K, *infra*).

full-time employee. (Appendix J). Consequently, since Mr. Cutright clearly was not a part-time, temporary or intermittent employee. Therefore, the issue of whether or not he had an "established regular tour of duty during each administrative workweek" is moot. The clear wording of the Leave Act establishes that the "regular tour of duty" requirement applies *only* to government employees hired as part-time employees. 5 U.S.C. § 6301(2)(ii).

By relying on facts *dehors* the record, the court below abused its discretion in granting summary judgment in favor of the government. Consequently, this Honorable Court should reverse the ruling of the United States Court of Appeals for the Federal Circuit and should remand with instructions to enter judgment in favor or Marvin Cutright and to consider whether the case should be certified as a class action.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari should be granted to permit a resolution of important issues affecting Petitioner Marvin D. Cutright, all federal court reporters and other governmental

employees whose benefits have been or will be deprived by a government agency's improper denial of statutory, constitutional and contractual rights.

Respectfully submitted,

P. Christian Hague
Frank G. Salpietro
Meyer, Unkovic & Scott
1300 Oliver Building
Pittsburgh, PA 15222
(412) 456-2800

Brian G. Brunsvold, Esquire
Finnegan, Henderson, Farabow,
Garret & Dunner
1300 I Street, N.W., Suite 700
Washington, D.C. 20005-3315
(202) 408-4000

Attorneys for Petitioner
Marvin D. Cutright

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APPENDIX A

United States Court of Appeals
for the Federal Circuit

91-5031, -5044
MARVIN D. CUTRIGHT, on behalf of himself and all others similarly situated,

Plaintiffs-Appellants,

v.

THE UNITED STATES,

Defendant/Cross-Appellant.

DECIDED: January 14, 1992

Before ARCHER, LOURIE, and RADER, *Circuit Judges.*

RADER, *Circuit Judge.*

Mr. Marvin Cutright, a retired court reporter, claims entitlement to, and seeks compensation for, leave he had not used at the time of his retirement. The United States Claims Court awarded Mr. Cutright leave benefits, but limited the award to 240 hours under 5 U.S.C. § 6304(a) (1988). *Cutright v. United States,* 21 Cl. Ct. 490, 496-97 (1990). Mr. Cutright appeals the limit on his award. The United States cross-appeals the Claims Court's determination that Mr. Cutright is entitled to payment for unused leave.

Because Mr. Cutright was a part-time employee without a regular tour of duty, *see,* 5 U.S.C. § 6301(2)(B)(ii)

(1988), this court reverses the Claims Court's ruling on payments for unused leave.

BACKGROUND

Mr. Cutright was a court reporter for the United States District Court for the Western District of Pennsylvania from August 30, 1958 until his retirement on October 6, 1986. At retirement, Mr. Cutright sought payment under the Leave Act, 5 U.S.C. §§ 6301-6326 (1988), for sick and annual leave time which he claimed he had accrued but not used. The Administrative Office of the United States Courts paid Mr. Cutright only for unused leave from 1984 to 1986.

The Administrative Office has responsibility to "[s]upervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts." 28 U.S.C. § 604(a)(1) (1988). In denying Mr. Cutright's request, the Administrative Office explained that the Leave Act did not cover court reporters before January 1984.

In 1983, the Judicial Conference of the United States first made court reporters eligible to accrue leave. This policy extended to court reporters "who ha[ve] been placed on a regular tour of duty consisting of a set number of work hours per week in the courthouse, specified in advance." *Reports of the Proceedings of the Judicial Conference of the United States*, p. 49 (1983). According to the Administrative Office, Mr. Cutright had no "regular tour of duty" until 1984. Therefore, the Administrative Office paid Mr. Cutright only for those periods during

which the Leave Act covered court reporters. The Administrative Office denied his request for payments dating back to 1958.

Mr. Cutright filed a claim in the Claims Court for leave benefit payments from 1958 through 1984. Mr. Cutright moved to certify a class action on behalf of "present and former judicial system employees who have been afforded less than full benefits granted under the Leave Act." The Claims Court denied the motion. *Cutright v. United States*, 15 Cl. Ct. 576, 579 (1988). Mr. Cutright appeals this denial.

Mr. Cutright also moved for summary judgment on his entitlement to payments for unused leave. He presented several earnings statements to show he had received a salary based on a 40-hour workweek. *Cutright*, 21 Cl. Ct. at 495 n.14. The Claims Court granted Mr. Cutright's motion for summary judgment. The Claims Court, however, noted that Mr. Cutright could not accumulate more than 240 hours of leave under 5 U.S.C. § 6304(a). Therefore, the Claims Court limited his recovery to payment for 240 hours. Mr. Cutright appeals this limit on his compensation award. The United States cross-appeals the Claims Court's judgment in Mr. Cutright's favor.

DISCUSSION

Under summary judgment rules, the moving party must show both the absence of genuine issues of material fact and entitlement to judgment as a matter of law. Fed. R. Civ. P. 56. Moreover, the trial court must resolve significant doubts about factual issues in favor of the non-

movant. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

Leave Act

The Leave Act permits Government employees to accrue annual and sick leave. 5 U.S.C. §§ 6303, 6307. The Act, however, does not cover every Government employee. Section 6301 of title 5 specifically excludes:

> a part-time employee who does not have an established regular tour of duty during the administrative workweek;

5 U.S.C. § 6301(2)(ii).

In *Lemily v. United States*, 418 F.2d 1337 (Ct. Cl. 1969), the United States Court of Claims explained the meaning of the phrase "part-time employee who does not have an established regular tour of duty." In that case, the Court of Claims applied the part-time employee exclusion to relief deck officers and engineers. The *Lemily* plaintiffs were temporary employees paid at an hourly rate on a when-actually-employed basis. *Id.* at 1338. Although they apparently worked the equivalent of a 40-hour work-week, the Court of Claims determined that the *Lemily* plaintiffs were part-time employees without a regular tour of duty. *Id.* at 1345. Therefore, the *Lemily* plaintiffs received no Leave Act benefits.

In construing the section 6301 exclusion, the Court of Claims stated:

> There is no evidence of a legislative intent to otherwise alter or relax the basic concept of a tour of duty as representing a specific period of

> time, regularly established in advance, during which an employee is unequivocally required to work.

Lemily, 418 F.2d at 1344. Thus, the Court of Claims clarified that the "regular tour of duty" standard requires part-time employees to work at specific times to qualify for Leave Act benefits. Those duty hours must be set in advance. Otherwise the part-time employee does not have a regular tour of duty within the administrative workweek. The *Lemily* plaintiffs' "relationship with their employer was essentially one of mutual convenience wherein duty assignments resulted from a day-to-day and generally informal alignment of available work with [individuals] willing and able to do it." *Id.* Therefore, the section 6301 exclusion operated to deny them Leave Act benefits.

From 1958 to 1984, Mr. Cutright was a part-time employee. Mr. Cutright was free to take work from independent sources. Whenever not in court, Mr. Cutright could record depositions for private attorneys or otherwise market his skills. When Mr. Cutright took vacation, the district court required him to hire his own replacement. Although the Government generally supplies equipment for full-time employees, title 28 specifically required court reporters to supply their own recording equipment. 28 U.S.C. § 753(e)(1948).

From 1958 to 1984, Mr. Cutright also lacked a regular tour of duty. The absence of a regular tour of duty is another indication of Mr. Cutright's part-time employee status. The district court did not require Mr. Cutright's services at the courthouse for 40 hours each week. Instead, he came to the court only when his services were

required. The district court did not exercise full-time supervision over Mr. Cutright. He could leave the courthouse when not in service. Indeed, the Claims Court noted that Mr. Cutright's "uncertain work schedule . . . required him to work more than 40 hours one week, and less than 40 hours another week." *Cutright*, 21 Cl. Ct. at 495. The Claims Court also noted that Mr. Cutright's schedule "was subject to the needs of the court." *Cutright*, 21 Cl. Ct. at 495. Specifically, Mr. Cutright performed his services "often without advance notice." *Id.* These findings disclose that Mr. Cutright's work hours were not regular nor were they set in advance. Mr. Cutright did not have a regular tour of duty. In sum, under the terms of section 6301, Mr. Cutright was a part-time employee without a regular tour of duty from 1958 to 1984.

This conclusion is consistent with a series of Comptroller General decisions spanning nearly four decades.* As early as 1945, the Comptroller General determined that court reporters were part-time employees outside the Leave Act:

> [T]he nature of the duties of court reporters is such as to be inconsistent with the granting of leave of absence with pay. It is concluded, therefore, that court reporters employed under the 1944 statute are not full-time employees, but

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*This court does not consider Comptroller General decisions binding on the Claims Court. *National Forge Co. v. United States*, 779 F.2d 665, 668 (Fed. Cir. 1985) (citing *Burroughs Corp. v. United States*, 617 F.2d 590, 597 (Ct. Cl. 1980)). Rather this court refers to these Comptroller General decisions to show the reasons that the 1983 Judicial Conference of the United States undertook to provide reporters a regular tour of duty.

> rather, part-time or intermittent employees, within the meaning of the leave regulation and, as such, are excluded from the benefit of receiving leave of absence with pay under the annual leave statute and regulations thereunder.

25 Comp. Gen. 185, 187-88 (1945). In 1951, the Comptroller General again decided that, without a regular tour of duty set in advance, part-time employees would not earn Leave Act benefits even though working a 40-hour week. 31 Comp. Gen. 215, 217-18 (1951). The next year, the Comptroller General defined a "regular tour of duty" as a "definite and certain time, day and/or hour of any day, during the workweek when the employee regularly will be required to perform duty." 31 Comp. Gen. 581, 584 (1952). In 1974, the Comptroller General again determined that day-to-day variance in court schedules prevented reporters from working a "regular tour of duty." 54 Comp. Gen. 251, 258 (1974).

The Court Reporters Act, 28 U.S.C. § 753 (1988), gave the Judicial Conference supervisory authority over court reporters. Exercising this statutory power, the Judicial Conference in 1983 authorized courts to place reporters on a regular tour of duty:

> Beginning with the 1984 leave year (effective January 8, 1984) a reporter who has been placed on a regular tour of duty consisting of a set number of work hours per week in the courthouse, specified in advance . . . is to earn annual leave in accordance with the Leave Act. 5 U.S.C. § 6301 et seq.

Report of the Proceedings of the Judicial Conference of the United States, p. 49 (1983). This action, for the first time,

enabled court reporters to earn Leave Act benefits. The Judicial Conference's resolution provided that court reporters on a regular tour of duty "may not perform any private (free lance) work of any kind." *Id.* This action recognized that, and indeed was only necessary because, court reporters before 1984 were part-time employees without a regular tour of duty.

The Claims Court erred when it determined that Mr. Cutright was a full-time employee eligible for Leave Act benefits at the inception of his employment in 1958. *Cutright*, 21 Cl. Ct. at 495-96. In reaching this incorrect conclusion, the trial court gave undue weight to evidence that Mr. Cutright "was guaranteed payment for a 40 hour week." *Id.* at 495. In *Lemily*, the Court of Claims defined a full-time employee in terms which exclude Mr. Cutright:

> In general, the full-time employee . . . is one regularly required to put in the standard work-week, not a when actually-employed employee who happens to work the annual equivalent of a 40-hour week.

Lemily, 418 F.2d at 1345. Mr. Cutright was not required to work a standard workweek from 1958 to 1984. Rather Mr. Cutright worked at the convenience of the court. The variance in Mr. Cutright's day-to-day schedule shows that he was a "when-actually-employed" employee who was free to earn compensation as a private entrepreneur when not actually in court service. Mr. Cutright's tour of duty was neither regular nor set in advance.

Like the *Lemily* plaintiffs, Mr. Cutright contends that he worked and received payment for the equivalent of a 40-hour week. In the absence of a regular tour of duty, set

in advance, however, the Court of Claims determined that working the equivalent of a 40-hour week did not qualify the *Lemily* plaintiffs for Leave Act benefits. This rule applies as well to Mr. Cutright. The Claims Court erred in concluding that Mr. Cutright was a full-time employee.

The Claims Court also erred in holding that the Government committed administrative error in denying Mr. Cutright Leave Act benefits. *Cutright*, 21 Cl. Ct. at 496. Section 6304(d)(1) of 91-5031, – 5044 title 5, which permits restoration of leave balances lost due to administrative error, applies only to employees covered by the Leave Act. The Leave Act did not cover Mr. Cutright from 1958 to 1984. Therefore, Mr. Cutright earned no Leave Act benefits. Even if administrative error occurred, section 6304(d) (1) could not restore to Mr. Cutright benefits which he was not eligible to earn in the first place.

In sum, the Claims Court was incorrect in determining as a matter of law that Mr. Cutright qualified for Leave Act benefits from 1958 to 1984. Rather, the record shows that Mr. Cutright was a part-time employee without a regular tour of duty during the administrative workweek. Therefore, the Leave Act did not cover Mr. Cutright. In view of its decision, this court need not consider Mr. Cutright's argument that the Claims Court improperly refused to certify a class action.

CONCLUSION

Because Mr. Cutright was a part-time employee without a regular tour of duty from 1958 to 1984, this court reverses the Claims Court's award of lump-sum payment for benefits under the Leave Act.

COSTS

Each party shall bear its own costs.

REVERSED

APPENDIX B

In the United States Claims Court

No. 172-88C

(Filed October 3, 1990)

MARVIN D. CUTRIGHT Plaintiff, v. *THE UNITED STATES,* Defendant.	Civilian pay; Summary judgment; Annual and Sick Leave Act (5 U.S.C. § 6301 (1982)); Court reporters; Full-time v. Part-time employment; "Irregular tour of duty" exception; Administrative error.

P. Christian Hague, Pittsburgh, Pennsylvania, attorney of record for plaintiff. ***Frank G. Salpietro, Brian G. Brunsvold, Meyer, Unkovic & Scott and Finnegan, Henderson, Farabow, Garret & Dunner,*** of counsel.

Agnes M. Brown, Washington, D.C., with whom was ***Assistant Attorney General Stuart M. Gerson,*** for defendant. ***David M. Cohen,*** Director, and ***Thomas W. Petersen,*** Assistant Director, of counsel.

OPINION

Futey, Judge.

This case is before the court on plaintiff's motion for summary judgment and defendant's cross-motion for summary judgment. Plaintiff is seeking retribution of

annual and sick leave benefits, which allegedly accrued during his tenure as a court reporter, pursuant to the Annual and Sick Leave Act, 5 U.S.C. § 6301 (1982). Defendant denies owning any sums to plaintiff and contends that plaintiff was not entitled to leave benefits prior to 1984.

Factual Background

Plaintiff, Marvin Cutright, was continuously employed as a court reporter for the United States district courts from September 1958 to October 1986. During this period, plaintiff worked at least 8 hours a day, 5 days a week.[1] Although plaintiff was not guaranteed a certain number of hours of work each week, he received a fixed weekly salary irrespective of the number of hours actually worked. Plaintiff's salary was based on a 40-hour workweek. In addition, plaintiff did not augment his salary by earnings from the sale of transcripts to private parties.[2] As a court reporter, plaintiff enjoyed annual and sick leave at the discretion of the court.

Upon retirement, plaintiff requested leave benefits from the Administrative Office of the United States courts (AO).[3] Plaintiff alleged entitlement to these benefits

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[1] Affidavit of Marvin D. Cutright in support of his motion for summary judgment, p. 1.

[2] Defendant notes that court reporters often receive compensation from private sources for the production of official transcripts. However, the record is void of any evidence that plaintiff ever performed such outside work.

[3] The Administrative Office (AO) has the responsibility to "supervise all administrative matters relating to the offices of

(Continued on following page)

under the Annual and Sick Leave Act, 5 U.S.C. § 6301 (1982) (Leave Act).[4] The AO informed him that until 1984, all court reporters were considered intermittent federal employees not covered by the Leave Act. The AO explained that, beginning January 1, 1984, those court reporters placed on regular tours of duty (i.e. fixed hours specified in advance) earned annual and sick leave pursuant to policy set forth by the Judicial Conference of the United States[5] (Judicial Conference). In accordance with this policy, the clerks of the court were instructed to maintain leave records for court reporters with regular tours of duty. Prior to this date, defendant maintained no

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(Continued from previous page)

the clerks and other clerical and administrative personnel of the courts." 28 U.S.C. § 604(A)(1) (1988).

[4] Federal employees covered by the Leave Act earn a specific number of annual and sick leave commensurate with their tenure. A full-time employee is entitled to annual leave at an accrual rate of: (a) One-half day for each bi-weekly pay period for an employee with less than 3 years of service; (b) Three-fourths day for each full bi-weekly period for an employee with 3 but less than 15 years of service; (c) One day for each full bi-weekly pay period for an employee with more than 15 years of service. 5 U.S.C. § 6303 (1982). A federal employee accumulates sick leave at a rate of one-half day for each full bi-weekly period. 5 U.S.C. § 6307 (1982). Upon departure from government service, such employees are entitled to a lump sum payment for accumulated annual leave. Sick leave is credited toward civil service retirement annuity, but is not calculated into a lump sum payment.

[5] Under 28 U.S.C. § 753 (1988), court reporters are appointed and employed by the district courts subject to the supervision of the Judicial Conference.

leave records for plaintiff. The AO determined that plaintiff was only entitled to annual and sick leave benefits after January 9, 1984, when he was assigned a regular tour of duty by the clerk of the court.

Plaintiff filed an action in this court on March 15, 1988, seeking recovery of benefits allegedly denied him under the Leave Act.[6] Plaintiff claims his accrued and accumulated benefits total 1,480 hours annual leave and 2,913 hours sick leave.[7] In addition, plaintiff moved for certification of the case as a class action. The motion was denied by Order of the court filed October 11, 1988. *Marvin D. Cutright v. United States*, 15 Cl. Ct. 576 (1988).

Plaintiff filed a motion for summary judgment on July 31, 1989. Defendant filed a cross-motion for summary judgment on September 27, 1989. Following the submission of all required pleadings, oral argument on the parties' cross-motions for summary judgment was heard by this court on August 27, 1990.

Jurisdiction

Plaintiff seeks compensation from the United States for accrued annual and sick leave benefits, pursuant to the Annual and Sick Leave Act, 5 U.S.C. § 6301 (1982). Jurisdiction is, therefore, proper under 28 U.S.C. § 1491 (1982).

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[6] Complaint ¶ 2.

[7] While the court will determine whether Mr. Cutright is entitled to Leave Act benefits for service prior to 1984, any calculation of annual and sick leave due plaintiff under the Act remains a matter for resolution between the parties.

Summary Judgment

Summary judgment is appropriate where the pleadings raise no genuine dispute as to any material fact and, as a matter of law, the moving party is entitled to judgment. RUSCC 56; *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 247 (1986). The moving party bears the burden of establishing an absence of evidence to support the nonmovant's case. *Adickes v. S.H. Kress and Co.*, 398 U.S. 144, 157 (1970). The party opposing summary judgment has the burden of showing sufficient evidence, not necessarily admissible, of a genuine issue of material fact in dispute. *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). Any doubt over factual issuès must be resolved in favor of the party opposing summary judgment, *Litton Indus. Prods., Inc. v. Solid State Sys. Corp.*, 755 F.2d 158, 163 (Fed. Cir. 1985), to whom the benefit of all presumptions and inferences runs. *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985).

To grant summary judgment in the present case, the court must determine, as a matter of law, whether plaintiff is entitled to annual and sick leave coverage for his entire term as a court reporter. Thus, the court is presented with the question of proper interpretation of a statute. The court may rule on that interpretation as a pure issue of law. *McKart v. United States*, 395 U.S. 185, 198 (1969).

Discussion

A. Issue Presented

The threshold issue to be decided by the court is whether plaintiff was covered by the Leave Act prior to

1984. If the Leave Act is applicable to plaintiff, then the court must determine whether plaintiff may recover annual and sick leave for his entire term of appointment as a court reporter.

Plaintiff states that throughout his term as a court reporter, he was a full-time employee within the meaning of the Leave Act. Defendant avers that plaintiff's lack of a regularly established tour of duty precluded his coverage under the Leave Act until 1984, when the court assigned him to a fixed work schedule.[8] Defendant argues that only a full-time employee with a regular tour of duty falls within the ambit of the Leave Act.[9] Defendant alternatively contends that, even if plaintiff was entitled to Leave Act benefits before 1984, he has forfeited all but 240 hours of his annual leave.

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[8] The AO credited plaintiff with the amounts of annual and sick reflected in the leave records maintained by the clerk of the district court where plaintiff was employed as a court reporter. Thus, plaintiff received benefits based on service after January 9, 1984.

[9] Defendant argues that "in order to be entitled to accrue[d] leave under the Leave Act, an employee must be a full-time employee with an established regular course of duty during the administrative workweek." Defendant's Cross Motion for Summary Judgment, p. 8. Defendant also stated at oral argument: "section 6301(2) [of the Leave Act] is the section that we believe that specifically excludes Mr. Cutright. That section excludes part-time employees who do not have a regular tour of duty. So in order to be entitled to benefits under the Leave Act, an employee has to be a full-time employee, with an established course of duty during the administrative workweek." Transcript (tr.) p. 33.

B. Coverage Under the Annual and Sick Leave Act

The Annual and Sick Leave Act provides a comprehensive system of regulation and administration of leave accrual, accumulation, and payment for the federal government. With certain exceptions, the Leave Act applies to all federal "employees" as that term is defined in 5 U.S.C. § 2105 (1982). Under that definition, an employee refers to the "vast majority of civilian employees", including any individual appointed in civil service by the President, an officer (i.e. a judge), or another employee, who performs a federal function and is supervised by a federal officer or employee in the performance of his or her duties. 5 U.S.C. § 2105 (1982); *Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986); *Costner v. United States*, 229 Ct. Cl. 87, 655 F.2d 1016 (1981). Both parties agree that plaintiff falls within the definition of "employee" under § 2105.[10] Section 6301 of the Act sets forth specific

---

[10] Section 6301(2) of the Act, in relevant part, provides the following definition of employee:

> (2) "employee" means –
>
> (A) an employee as defined by section 2105 of this title; and
>
> (B) an individual employed by the government of the District of Columbia
>
> but does not include –
>
> * * *
>
> (ii) a part-time employee who does not have an established regular tour of duty during the administrative work-week.

(Continued on following page)

categories of employees excluded by the Leave Act. The Leave Act reflects a congressional intention that these exceptions to leave system coverage be narrowly construed.[11] All civilian "employees" who do not fall within any of these enumerated exceptions are entitled to Leave Act benefits. *Sauer v. United States*, 173 Ct. Cl. 642, 649, 354 F.2d 302, 305 (1965). Congress did not explicitly exclude official court reporters from the purview of the Act. The only exclusion in the Leave Act possibly applicable to plaintiff is for a "part-time employee who does not have an established regular tour of duty during the administrative workweek."[12] 5 U.S.C. § 6301(2)(B)(ii) ("irregular tour of duty" exception).

Contrary to defendant's contention, the plain language of the Leave Act dictates that the "irregular tour of duty" exception only applies to part-time employees. To

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(Continued from previous page)

Defendant does not contest that plaintiff falls within the general definition of "employee" under 5 U.S.C. § 2105. Rather, defendant argues that plaintiff is specifically exempted by § 6301(2)(B)(ii) of the Leave Act.

[11] In the 1978 Amendments to the Leave Act, Congress explained:

> The Annual and Sick Leave provisions contained in subchapter I of chapter 63 of title 5, United States Code, apply to the vast majority of federal employees. The provisions do not apply to elected officials, such as members of Congress, or to certain specific categories of appointed employees. *Legislative History of P.L. 95-519*, 92 Stat. 4160.

[12] Defendant has not brought to the attention of the court, nor is the court aware of, any other exclusion set forth in the Leave Act applicable to plaintiff.

read § 6301(2)(B)(ii) of the Act, which excludes "part-time employees with a regular tour of duty during the administrative workweek", as limiting Leave Act coverage to full-time employees with a regular course of duty would torture the clear and unequivocal meaning of that section and frustrate the Act's legislative presumption in favor of employee coverage. If Congress had intended to restrict annual and sick leave benefits to employees with work schedules fixed in advance, it would have so stated. Moreover, the following passage from the House and Senate Reports indicates that Congress had a contrary intention in adding § 6301(2)(B)(ii) to the Leave Act:

> The bill [now § 6301(2)(B)(ii)] would extend the benefits of the Annual and Sick Leave Act on a pro rata basis to all part-time Federal employees for whom there has been established a regular tour of duty covering not less than five days in any administrative workweek.

H.Rep. No. 655, S.Rep. No. 971; U.S. Code Cong. Serv., pp. 1972-74 (Vol. 2, 1949).

These statements reveal a congressional purpose of expanding Leave Act coverage, rather than precluding certain full-time employees from participation in the leave system. Given the legislative history of the Act, the court holds that the "irregular tour of duty" exception has no application to full-time employees.

The Court of Claims, the predecessor to this court, had occasion to examine the "irregular tour of duty" exception in ***John T. Lemily v. United States,*** 190 Ct. Cl. 57, 418 F.2d 1337 (1969). In ***Lemily,*** temporary relief deck officers and engineers sought recovery of annual and sick leave benefits, contending coverage under the Act. The

court first inquired into whether the claimants were full-time employees. After determining that the deck officers and engineers were part-time, rather than full-time, employees, the court applied § 6301(2)(B)(ii) of the Leave Act and concluded that the claimants were not entitled to leave because they did not work pursuant to a "regular tour of duty." *Id.* at 72, 418 F.2d at 1345. The Court of Claims' two-step approach in determining Leave Act coverage is controlling here and entirely consistent with the legislative purpose behind the "irregular tour of duty" exception. In applying this two-part test, the court must first determine whether plaintiff was either a full or part-time employee. If plaintiff was a full-time employee, then he was entitled to leave benefits. If he was a part-time employee, then he is only entitled to annual and sick leave if he served pursuant to "a regular tour of duty."

C. The Leave Act's General Requirement of Full-Time Employment

After examining the evolution of the Leave Act, the Court of Claims in ***Lemily*** articulated the following definition of a full-time employee:

> Plaintiffs' contention that a person who works the annual equivalent of a 40-hour week is, by definition, not a "part-time" employee under the [Leave] Act, is without merit.
>
> * * *
>
> The Legislative history of the 1951 Act . . . makes it abundantly clear that the government employee for whom the Congress fashioned the generally applicable leave benefits was one who was *required* to regularly put in the

> standard 40-hour workweek. A "basic workweek" is so defined in Civil Service Regulations. 5 C.F.R. § 25.211 (Rev. as of Jan. 1961). Thus, the annual and sick leave allowances provided in the 1951 Act are stated in terms of days, or fractions thereof, "for each biweekly pay period." The regular 40-hour week is implicit in that arrangement.

Lemily, 190 Ct. Cl. 70-71, 418 F.2d at 1344-45.

Therefore, a full-time employee under the Leave Act is one who is regularly required to put in a standard workweek, not an employee paid only "when actually employed" who happens to work the annual equivalent of a 40-hour workweek.

In the instant case, plaintiff, as a court reporter, was generally required to prepare transcripts of judicial proceedings and file copies of these transcripts with the clerk of the court. Plaintiff drew a salary for his services as a court reporter.[13] Plaintiff attests that he continuously received a fixed salary based on a 40-hour workweek. Plaintiff submitted earning statements which reflect payment for 80-hours each bi-weekly pay period.[14] Plaintiff's work schedule was subject to the needs of the court. He was required to be available to report proceedings held

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[13] Plaintiff's salary was established by the Judicial Conference.

[14] In his supplemental memorandum, plaintiff included earning statements dating from 1982, 1983, 1984, 1985, and 1986. Plaintiff states in his supplemental affidavit that he was always paid for 40 hours a week and that the submitted statements are a representative sample of earnings received during his entire term of appointment.

by the court, often without advance notice.[15] Plaintiff states that he never received compensation on a per diem basis. His compensation was not commensurate with the number of transcripts recorded, the length of each transcript, or any other method suggesting a "paid-when-actually-employed" arrangement. Despite an uncertain work schedule that invariably required him to work more than 40 hours one week, and less than 40 hours another week, plaintiff earned a full-time salary. Plaintiff was obligated to work, or be available for work, for at least 40 hours each week. Plaintiff did more than work the annual equivalent of a 40 hour workweek; he was guaranteed payment for a 40 hour week and required to put in a standard workweek throughout his 28 years of service. The court, therefore, finds that plaintiff was a full-time employee[16]

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[15] Affidavit of Marvin D. Cutright in support of his motion for summary judgment, *supra*.

[16] Defendant has considered plaintiff a full-time employee for other purposes. The GUIDE TO JUDICIARY POLICIES AND PROCEDURES: COURT REPORTERS MANUAL, published by the Administrative Office, states the following Judicial Conference policy regarding salary:

> All official court reporters who have satisfactorily completed ten years of *full-time* service as a court reporter for a United States District Court shall receive the starting salary established by the Judicial Conference of the United States, plus a five percent longevity increase over that starting salary.

Guide, trans. 3, vol. VI, Ch. 5 (7/12/85).

Plaintiff received longevity increases pursuant to the aforementioned policy. Defendant, thus, indirectly acknowledges that plaintiff was a full-time employee prior to 1984.

from his appointment as a court reporter in 1958 until his retirement in 1986.[17]

As a full-time court reporter, plaintiff was an "employee" within the definition of 5 U.S.C. § 2105, not subject to any exception set forth in § 6301(2)(B). Plaintiff was thus covered by the Leave Act for his entire term of appointment.

D. Administrative Error and the Restoration of Leave Balances

Defendant alternatively argues that, even if plaintiff was covered by the Leave Act prior to 1984, he has forfeited whatever balances are due him under the Act. Plaintiff contends that defendant's failure to grant him leave in accordance with the Leave Act from 1958 through 1983 was administrative error justifying restoration of leave balances pursuant to 5 U.S.C. § 6304(d)(1).

Under 5 U.S.C. § 6304(a), annual leave which exceeds the accumulation permitted by law (here, 30 days or 240

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[17] Given the evidence at hand, this court does not perceive how plaintiff's employment status was transformed by a prearranged "regular tour of duty" in 1984. Plaintiff received compensation for a standard workweek both before and after this date. By virtue of his full-time salary, plaintiff was, at the very least, required to be available to perform all work specified by the court for a certain number of hours each week. Indeed, defendant's implementation of a "regular tour of duty" policy appears to be no more than a vain attempt to avoid retroactive payment of annual and sick leave benefits to an otherwise entitled employee. However, since plaintiff was a full-time employee throughout his term of appointment, the court need not decide whether he served pursuant to a "regular tour of duty" prior to 1984.

hours) is forfeited at the beginning of the first full pay period in a year. There is no corresponding forfeiture provisions for sick leave.[18] Forfeited annual leave may be restored in limited circumstances set forth in 5 U.S.C. § 6304(d)(1):

> (d)(1) Annual leave which is lost by operation of this section because of –
>
> (a) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960.
>
> (b) exigencies of the public business when the annual leave was scheduled in advance.
>
> * * *
>
> shall be restored to the employee.

Administrative error encompasses more than mere clerical mistakes. For example, the Court of Claims found administrative error where a government employee's supervisors "failed to fulfill their obligations under law to see that leave was "in fact scheduled for use'." ***Arthur E. Quillo v. United States,*** 229 Ct. Cl. 540 (1981). The Comptroller General determined that the government committed administrative error by improperly denying several Administrative Law Judges court leave under 5 U.S.C. § 6322 (1982), ADMINISTRATIVE LAW JUDGES – COURT LEAVE, 64 Comp. Gen. 200 (1985), and by misstating applicable law to employees, PAUL A. CARR AND GERALD B. SEACH – RESTORATION OF FOREFEITED ANNUAL LEAVE, Comp. Gen. Dec. B-222221 (Unpublished Sept. 8, 1986).

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[18] Section 6307 governs the accrual of sick leave. Section 6307(b) states that sick leave not used by an employee "accumulates for use in succeeding years."

Plaintiff was legally entitled to Leave Act coverage prior to 1984. Defendant's exclusion of plaintiff from the leave system was based on an erroneous interpretation of the Leave Act. By depriving plaintiff of Leave Act benefits, defendant failed to fulfill its statutory obligation of providing annual and sick leave benefits to an eligible employee. Defendant, therefore, committed administrative error within the meaning of § 6304(d)(1).

Defendant's administrative error does not, however, entitle plaintiff to 28 years of accrued annual leave. Under § 6304(a), plaintiff was entitled to carryover a maximum of 240 hours of annual leave[19] from one year to the next. Even with the operation of the forfeiture provision, plaintiff could not carryover more annual leave than permitted under § 6304(a). The court, therefore, holds that plaintiff forfeited all annual leave exceeding the maximum carryover set forth in 5 U.S.C. § 6304(a). In addition, the court holds that plaintiff is entitled to restoration of sick leave which accrued from September 1958 to October 1986.[20] ***John Burich v. United States,*** 177 Ct.

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[19] Section 6304(d)(1) enabled plaintiff to restore annual leave which would have accrued, but for administrative error, up to the 240 hour maximum accumulation as provided by law.

[20] Defendant's failure to keep leave records for plaintiff, prior to 1984, does not prevent plaintiff from recovering his entitled benefits. Plaintiff's affidavits, earning statements, and Standard Form 1150 constitute satisfactory evidence of the amount of accumulated leave due him under the Act. ***Sauer v. United States,*** 173 Ct. Cl. 642, 354 F.2d 302 (1965).

Cl. 139, 366 F.2d 984 (1967). The court recognizes that plaintiff was excluded from the leave system prior to 1984, and was, therefore, unable to prevent the forfeiture of annual leave. However, a contrary result would put plaintiff in a better position than other employees covered by the Leave Act and thereby create a windfall for plaintiff not contemplated by the Act.

Finally, defendant states that a determination by this court that plaintiff can recover annual and sick leave would impose a very large financial burden upon the United States, since all court reporters were similarly excluded by defendant from the leave system. The court's decision is not a mandate for recovery of leave benefits by every court reporter employed by defendant prior to 1984. Rather, recovery is predicated upon a showing of an employment relationship within the ambit of the Act. The language in the Leave Act is clear and unequivocal in not exempting full-time employees from sick and leave benefits. If full-time court reporters are to be excluded by the Act, it is a matter for legislative, not judicial consideration. The court, therefore, holds that plaintiff was covered by the Leave Act from September 1958 to October 1986. The court further holds that plaintiff is entitled to annual and sick leave benefits calculated in a manner consistent with this Opinion. Defendant is directed to provide plaintiff with a lump sum payment for annual leave and credit plaintiff for sick leave due under the Leave Act for purposes of retirement benefit annuity.

Conclusion

For the reasons stated above and pursuant to RUSCC 42(c), plaintiff's motion for summary judgment is hereby granted and defendant's cross-motion for summary judgment is denied. The parties are directed to file, within 45 days, a joint stipulation as to the amount due plaintiff for accrued and accumulated annual leave benefits and the hours to be credited plaintiff for sick leave, pursuant to the Leave Act, 5 U.S.C. § 6301 (1982).

Accordingly, the Clerk is directed to enter judgment at that time without further order by the court. No costs.

/s/ Bohdan A. Futey
BOHDAN A. FUTEY
Judge

APPENDIX C

CONSTITUTION OF THE UNITED STATES

* * *

ARTICLE I

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

* * *

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

* * *

TITLE V, UNITED STATES CODE

§ 2105. Employee

(a) For the purpose of this title, "employee", except as otherwise provided by this section or when specifically modified, means an officer and an individual who is –

(1) appointed in the civil service by one of the following acting in an official capacity –

(A) the President;

(B) a Member or Members of Congress, or the Congress;

(C) a member of a uniformed service;

(D) an individual who is an employee under this section;

(E) the head of a Government controlled corporation; or

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

* * *

SUBCHAPTER I – ANNUAL AND SICK LEAVE

§ 6301. Definitions

For the purpose of this subchapter –

(1) "United States", when used in a geographical sense, means the several States and the District of Columbia; and

(2) "employee" means –

(A) an employee as defined by section 2105 of this title; and

(B) an individual employed by the government of the District of Columbia;

but does not include –

(i) a teacher or librarian of the public schools of the District of Columbia;

(ii) a part-time employee who does not have an established regular tour of duty during the administrative work-week;

(iii) a temporary employee engaged in construction work at an hourly rate;

(iv) an employee of the Panama Canal Commission when employed on the Isthmus of Panama;

(v) a physician, dentist, or nurse in the Department of Medicine and Surgery, Veterans' Administration;

(vi) an employee of either House of Congress or of the two Houses;

(vii) an employee of a corporation supervised by the Farm Credit Administration if private interests elect or appoint a member of the board of directors;

(viii) an alien employee who occupies a position outside the United States, except as provided by section 6310 of this title;

(ix) a "teacher" or an individual holding a "teaching position" as defined as by section 901 of title 20;

(x) an officer in the executive branch or in the government of the District of Columbia who is appointed by the President and whose rate of basic pay exceeds the highest rate payable under section 5332 of this title;

(xi) an officer in the executive branch or in the government of the District of Columbia who is designated by the President, except a postmaster, United States attorney, or United States marshal;

(xii) a chief of mission (as defined in section 102(a)(3) of the Foreign Service Act of 1980); or

(xiii) an officer in the legislative or judicial branch who is appointed by the President.

Notwithstanding clauses (x)-(xii) of paragraph (2), the term "employee" includes any member of the Senior Foreign Service or any Foreign Service officer (other than a member or officer serving as chief of mission or in a position which requires appointment by and with the advice and consent of the Senate) and any member of the Foreign Service commissioned as a diplomatic or consular officer, or both, under section 312 of the Foreign Service Act of 1980.

* * *

§ 6302. General provisions

(a) The days of leave provided by this subchapter are days on which an employee would otherwise work and receive pay and are exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order.

(b) For the purpose of this subchapter an employee is deemed employed for a full biweekly pay period if he is employed during the days within that period, exclusive of holidays and nonworkdays established by Federal statute, Executive order, or administrative order, which fall within his basic administrative workweek.

(c) A part-time employee, unless otherwise excepted, is entitled to the benefits provided by subsection (d)

of this section and sections 6303, 6304(a), (b), 6305(a), 6307, and 6310 of this title on a pro rata basis.

(d) The annual leave provided by this subchapter, including annual leave that will accrue to an employee during the year, may be granted at any time during the year as the head of the agency concerned may prescribe.

(e) If an officer excepted from this subchapter by section 6301(2)(x)-(xiii) of this title, without a break in service, again becomes subject to this subchapter on completion of his service as an excepted officer, the unused annual and sick leave standing to his credit when he was excepted from this subchapter is deemed to have remained to his credit.

(f) An employee who uses excess annual leave credited because of administrative error may elect to refund the amount received for the days of excess leave by lump-sum or installment payments or to have the excess leave carried forward as a charge against later-accruing annual leave, unless repayment is waived under section 5584 of this title.

* * *

§ 6303. Annual leave; accrual

(a) An employee is entitled to annual leave with pay which accrues as follows –

(1) one-half day for each full biweekly pay period for an employee with less than 3 years of service;

(2) three-fourths day for each full biweekly pay period, except that the accrual for the last full biweekly pay period in the year is

one and one-fourth days, for an employee with 3 but less than 15 years of service; and

(3) one day for each full biweekly pay period for an employee with 15 or more years of service.

In determining years of service, an employee is entitled to credit for all service creditable under section 8332 of this title for the purpose of an annuity under subchapter III of chapter 83 of this title. However, an employee who is a retired member of a uniformed service as defined by section 3501 of this title is entitled to credit for active military service only if –

(A) his retirement was based on disability –

(i) resulting from injury or disease received in line of duty as a direct result of armed conflict; or

(ii) caused by an instrumentality of war and incurred in line of duty during a period of war as defined by sections 101 and 301 of title 38;

(B) that service was performed in the armed forces during a war, or in a campaign or expedition for which a campaign badge has been authorized; or

(C) on November 30, 1964, he was employed in a position to which this subchapter applies and thereafter he continued to be so employed without a break in service of more than 30 days.

The determination of years of service may be made on the basis of an affidavit of the employee. Leave provided by

this subchapter accrues to an employee who is not paid on the basis of biweekly pay periods on the same basis as it would accrue if the employee were paid on the basis of biweekly pay periods.

(b) Notwithstanding subsection (a) of this section, an employee whose current employment is limited to less than 90 days is entitled to annual leave under this subchapter only after being currently employed for a continuous period of 90 days under successive appointments without a break in service. After completing the 90-day period, the employee is entitled to be credited with the leave that would have accrued to him under subsection (a) of this section except for this subsection.

(c) A change in the rate of accrual of annual leave by an employee under this section takes effect at the beginning of the pay period after the pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, in which the employee completed the prescribed period of service.

(d) Leave granted under this subchapter is exclusive of time actually and necessarily occupied in going to or from a post of duty and time necessarily occupied awaiting transportation, in the case of an employee –

(1) to whom section 6304(b) of this title applies;

(2) whose post of duty is outside the United States; and

(3) who returns on leave to the United States, or to his place of residence, which is outside the area of employment, in its territories

or possessions including the Commonwealth of Puerto Rico.

This subsection does not apply to more than one period of leave in a prescribed tour of duty at a post outside the United States.

* * *

§ 6304. Annual leave; accumulation

(a) Except as provided by subsections (b), (d), (e), and (f) of this section, annual leave provided by section 6303 of this title, which is not used by an employee, accumulates for use in succeeding years until it totals not more than 30 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year.

* * *

(c) Annual leave in excess of the amount allowable –

(1) under subsection (a) or (b) of this section which was accumulated under earlier statute; or

(2) under subsection (a) of this section which was accumulated under subsection (b) of this section by an employee who becomes subject to subsection (a) of this section;

remains to the credit of the employee until used. The excess annual leave is reduced at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year, by the amount of annual leave the employee used during the preceding year in

excess of the amount which accrued during that year, until the employee's accumulated leave does not exceed the amount allowed under subsection (a) or (b) of this section, as appropriate.

(d)(1) Annual leave which is lost by operation of this section because of –

(A) administrative error when the error causes a loss of annual leave otherwise accruable after June 30, 1960;

(B) exigencies of the public business when the annual leave was scheduled in advance; or

(C) sickness of the employee when the annual leave was scheduled in advance;

shall be restored to the employee.

(2) Annual leave restored under paragraph (1) of this subsection, or under clause (2) of section 5562(a) of this title, which is in excess of the maximum leave accumulation permitted by law shall be credited to a separate leave account for the employee and shall be available for use by the employee within the time limits prescribed by regulations of the Office of Personnel Management. Leave credited under this paragraph but unused and still available to the employee under the regulations prescribed by the Office shall be included in the lump-sum payment under section 5551 or 5552(1) of this title but may not be retained to the credit of the employee under section 5552(2) of this title.

(e) Annual leave otherwise accruable after June 30, 1960, which is lost by operation of this section because of administrative error and which is not credited under

subsection (d)(2) of this section because the employee is separated before the error is discovered, is subject to credit and liquidation by lump-sum payment only if a claim therefore is filed within 3 years immediately following the date of discovery of the error. Payment shall be made by the agency of employment when the lump-sum payment provisions of section 5551 of this title last became applicable to the employee at the rate of basic pay in effect on the date of the lump-sum provisions became applicable.

* * *

§ 6307. Sick leave; accrual and accumulation

(a) An employee is entitled to sick leave with pay which accrues on the basis of one-half day for each full biweekly pay period, except that sick leave with pay accrues to a member of the Firefighting Division of the Fire Department of the District of Columbia on the basis of two-fifths of a day for each full biweekly pay period.

(b) Sick leave provided by this section, which is not used by an employee, accumulates for use in succeeding years.

(c) When required by the exigencies of the situation, a maximum of 30 days sick leave with pay may be advanced for serious disability or ailment, except that a maximum of 24 days sick leave with pay may be advanced to a member of the Firefighting Division of the Fire Department of the District of Columbia.

* * *

§ 6311. Regulations

The Office of Personnel Management may prescribe regulations necessary for the administration of this subchapter.

* * *

RECORD OF LEAVE DATA

1 Name (Last, First, Middle)	2 Social Security Number	3 (For agency use)
Cutright, Marvin D.	198-24-0237	

4 Date and Nature of Separation	5 A Subject to 5 U.S.C. 6304(b) (45 day leave ceiling)	Yes	No
10-3-86 Retirement	B Last Date Subject to 5 U.S.C. 6304(b)	C Annual Leave Balance as of That Date (Hours)	

6 Total Service for Leave (as of Date of Separation): X — More Than 15 Years; Less Than 15 Years (show) Years ____ Months ____ Days ____

SUMMARY OF ANNUAL AND SICK LEAVE

7 Carryover Balance From Prior Leave Year Ending	MO	DAY	YEAR	Annual	Sick	Restored
	8	30	58	1298	2900	
8 Current Leave Year Accrual Through Pay Period Ending (If 90 day restriction applicable, explain in remarks)				152	176	
9 Total				1450	2976	
10 Reduction in Credits, If Any (current year)						
11 Total Leave Taken, Current Year Through Date of Separation				169	2[illegible]4	
12 Balance				1281	2976	
13 Total Hours Paid in Lump Sum (Includes ____ hours for holidays)				[illegible]	[illegible]	
14 Salary Rate(s) Per Hour						

15 Lump Sum Leave Dates (If part-time tour explain in Remarks)		MO	DAY	YEAR	HOURS
	From				
	Thru				
a Restored	From				
	Thru				
b Annual Leave Above Ceiling	From				
	Thru				
c Annual Leave Within Ceiling	From				
	Thru				

ABSENCE WITHOUT PAY

16 During Leave Year in Which Separated	Hours

17 A Date of Last Equivalent Increase	MO	DAY	YEAR

B Total AWOP Hours Since Last Equivalent Increase (except during military service and while in receipt of OWCP payments)	Hours

SUMMARY OF HOME LEAVE

18 Basic Service Period of 24 Months of Continuous Service Abroad		MO	DAY	YEAR
	Date Started			
	Date Completed			

19 Current 12 Months Accrual Period Began on	MO	DAY	YEAR
Hours Absent Without Pay Since That Date →			

20 Current Balance (or accrual) as of	MO	DAY	YEAR
Number of Days →			

21 Twelve Months Accrual Date as of Date of Separation
Number of Days →

22 Dates Leave Used Prior 24 Months	FROM MO	FROM DAY	FROM YEAR	TO MO	TO DAY	TO YEAR

MILITARY LEAVE

23 During Current Calendar Year	FROM MO	FROM DAY	FROM YEAR	TO MO	TO DAY	TO YEAR
A Regular—Active Duty or Training						
B Special—Civil Disturbance						

24 Remarks (Include share leave information, if applicable)

Employee has been employed full time since 8-30-58. Leave records for court reporters were not maintained prior to 1-1-84. Employee calculated leave as full-time employee and contends if leave is pro rated as a part-time employee that totals would be higher because employee worked more than 40 hours per week.

25 Certified Correct By (Signature)	26 Title, Agency, Address, Telephone Number	27 Date
Maurice B. Cohill, Jr.	Chief District Judge Pittsburgh, Pa. Chief Judge U.S. District Court Western District of Pa. Pittsburgh, Pa.	12/10/86

Maurice B. Cohill, Jr.

STANDARD FORM 1150 (REV. 12-77)
CIVIL SERVICE COMMISSION
FPM SUPP. 296-31 AND 990-2

BEST AVAILABLE COPY

APPENDIX E

UNITED STATES GOVERNMENT

MEMORANDUM

DATE: May 20, 1982

REPLY TO ATTN OF: Carl H. Imlay, General Counsel

SUBJECT: Comments on Draft Material for Chapter X, Personnel Regulations, of Guide to Judiciary Policies and Procedures

TO: Raymond J. Mealy, Chief, Court Branch, Personnel Division

For the reasons stated that *judges* are the only officers or employees in the judicial branch who are excluded from the annual and sick leave system. The practice of allowing judges to decide whether their secretaries and law clerks are excluded has been superseded by the 1978 amendment clarifying the exceptions to the leave system (5 U.S.C. § 6301).

One district court held in 1948 that judges' secretaries and law clerks are covered by the annual and sick leave system, because there is no express statutory provision excluding them: "If this group of employees is to be excepted from the benefits of the Leave Law, Congress, as it has done in a number of other instances, should make the exception, not the Comptroller General or the Courts." *Cain v. U.S.*, 77 F. Supp. 505 (N.D. Ill. 1948). Citing this language, the Court of Claims held in 1965 that the Auditor of the Court of Claims was also covered by the leave system, since the position was not expressly

excluded and the Leave Act otherwise applies to "all civilian officers and employees of the United States." *Sauer v. United States*, 354 F.2d 302, 305 (Ct. Cl. 1965); see also 45 Comp. Gen. 587 (1966).

For many years the courts have continued to allow each judge to decide whether his secretaries and law clerks will be covered by the annual and sick leave system. This practice is based on a Comptroller General decision rendered in 1946 (25 Comp. Gen. 808), to which I refer in my memorandum of August 10, 1979, to Glenn Johnson. (Copy Attached)

The legislative history of the current 5 U.S.C. § 6301 indicates that an *express* exception is now necessary to exclude an officer or employee from the leave system. See the attached copy of H.R. Rep. No. 95-1496, August 16, 1978, pages 2-3. The House Report notes that some presidential appointees in the legislative and judicial branches had been assumed to be covered by the annual and sick leave provisions of title 5, while others had been assumed to be excluded. The 1978 amendment to 5 U.S.C. § 6301 was intended to make the exclusions explicit:

> The committee amendment to S. 1626 would eliminate the confusion existing under current law by specifically excepting from the annual and sick leave provisions any officer in the legislative or judicial branch who is appointed by the President. Thus, as a result of the committee amendment, all Presidentially appointed officers in the three branches of the Government will be treated alike for purposes of annual and sick leave coverage.

H.R. Rep. No. 95-1496, August 16, 1978, page 3.

Strictly speaking, the 1948 court decision should have been recognized as superseding the Comptroller General's administrative opinion; nevertheless, the optional practice has continued. In light of the 1965 Court of Claims decision and the 1978 amendment clarifying 5 U.S.C. § 6301, however, I conclude that we now should bring all officers and employees in the judicial branch under the leave system, other than judges, who are the only presidential appointees. Bankruptcy judges appointed during the transition period by the district court will also have to be covered. This change must be reflected in the Guide to Judiciary Policies and Procedures at Chapter X, Subchapter 1630.1, section A.1, which lists the officers and employees excluded from the leave system, and in Title XII of the Judge's Manual, at Exhibit D and section 10 on page XII-11. These paragraphs refer to the optional practice of excluding secretaries and law clerks. If there are other such references, they too, must be amended.

SUBJECT: Applicability of the Leave Act to Certain Officers and Employees in the Judicial Branch

TO: William E. Foley
Director

Introduction. The Division of Personnel has asked us to restate our views concerning the applicability of the Leave Act (5 U.S.C. §§ 6301-6323) to United States magistrates, United States bankruptcy judges and the personal staff of circuit and district judges. Under current judicial branch regulations, officers in the first two categories are automatically excluded from the Leave Act, while members of a judge's personal staff are included or excluded at each judge's discretion.

It is clear in our view that this procedure is improper under the law. While we believe we have sufficient discretion to temporarily maintain the status quo as to magistrates and bankruptcy judges, we feel it is imperative that the Judicial Conference change its regulations to place law clerks, secretaries and other judicial staff employees under the leave system. In recognition of the many practical problems associated with the retroactive application of such a change, we propose that it be applied only to new employees. This compromise position may or may not be legally supportable, however, and there is the risk that current and former employees could, as has occurred in the past, successfully sue for their leave benefits.

We are bringing this matter to your attention for reference to the appropriate committee of the Judicial Conference.

Current Provisions. With certain exceptions, the Leave Act applies to all "employees" as that term is defined in section 2105 of title 5. Under that definition, "employee" refers to virtually all civilian personnel, including all persons appointed in civil service by the President, an officer (such as a judge) or another employee. The only relevant exclusions in the Leave Act itself are for an "officer in the . . . judicial branch who is appointed by the President" (5 U.S.C. § 6301 (xii)), and "a part-time employee who does not have an established regular tour of duty during the administrative workweek" (5 U.S.C. § 6301 (ii)).

On their face, these provisions appear to exclude only judges (as Presidential appointees) and part-time magistrates and bankruptcy judges (who do not have regular tours of duty). Regulations of the judicial branch, however, expand upon these exceptions. Since 1949, the Judicial Conference has authorized each judge to decide whether his or her personal staff is to be covered by the statutory leave system. See Volume III, *Guide to Judiciary Policies and Procedures,* Title XII, ¶10 and Exhibit XII-D. With regard to magistrates, section 1.2 of the Regulations of the Director of the Administrative Officer of the United States Court Governing the Administration of the United States Magistrate System [reprinted in Volume IX-A, *Guide to Judiciary Policies and Procedures*] provides that full-time and part-time magistrates are not subject to the Leave Act. See also *id.* at Chapter II, ¶22. There appears to be no written authority setting out the rules for bankruptcy judges, but in fact, such officers do not participate in the leave system.

We see serious problems in the inconsistencies between these regulations and the Leave Act.

Legal Analysis. When the Leave Act was amended in 1978 to specifically exclude judges, Mr. Imlay inferred that this change required that all personnel not within that or any other exception must be deemed to be included within the Act's coverage. See memorandum from Mr. Imlay to R. Glenn Johnson (August 10, 1979), enclosed. Approximately one year ago, Mr. Imlay reiterated these views, and specifically recommended that the *Guide to Judiciary Policies and Procedures* be amended to bring all officers and employees in the judicial branch under the leave system save for those who are appointed directly by the President. See memorandum from Mr. Imlay to Raymond Mealy (May 20, 1982), enclosed. We are in complete agreement with Mr. Imlay's analysis, and we reiterate, most emphatically, his suggestion that the Guide be amended.

A quick review of the relevant case law makes clear why this change is necessary.

In *Cain v. United States,* 77 F. Supp. 505 (N.D. Illinois 1948), a retired secretary to a circuit judge sued under the Tucker Act to receive a lump-sum payment for her accrued annual leave. The court began by noting that a previous decision of the Comptroller General, 25 Comp. Gen. 808 (1946), had held that judges' staff were not to be included in the Leave Act because of the irregular nature of their hours.

> By reason of the nature of their duties it is apparent that such employees occupy a status different from that occupied by Federal civilian

> employees generally. . . . [T]here doubtless are many occasions when such employees, either because of court recess, absence of the judge, or other circumstances, are in a non-work status for extended periods during which they remain in a pay status.

Commenting upon the long and regular hours that judges' staff actually work, the court dismissed this finding as "merely an unsupported conclusion of fact," and held that judges' staff do in reality work full-time. 77 F. Supp. at 507. The court then explained why none of the exceptions to the Leave Act applied.

> Admittedly, plaintiff, as secretary to one of the United States Judges, was such a civilian employee and does not fall within one of the enumerated exceptions [in the Leave Act]. The language used in the Act is clear and unequivocal and admits of but one interpretation. Had Congress intended to except secretaries and law clerks to United States Judges from its provisions, I believe it would have included them among the enumerated exceptions. . . .
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> . . . . I believe that if this group is to be excluded from the coverage of the Leave Law, it is a subject for legislative not judicial consideration. To Congress is entrusted the power of enacting laws; interpretation only is lodged in the courts. If this group of employees is to be excepted from the benefits of the Leave Law, Congress, as it has done in a number of other instances, should make the exceptions, not the Comptroller General or the Courts.

77 F. Supp. at 507-508. Based upon the employer judge's certificate that plaintiff had accrued 25 days of unused annual leave, the court awarded her $297.

A similar Tucker Act claim was upheld in *Sauer v. United States*, 354 F.2d 302 (Ct. Cl. 1965). In that case, an auditor for the Court of Claims, upon his retirement, sought a lump-sum distribution for leave accumulated in prior service in the executive branch as well as during his tenure in the Court of Claims. As in *Cain*, the court specifically found that the Leave Act applied to judicial branch personnel.

Defendant denied the plaintiff's position in the judicial branch was covered by the Annual Leave Act of 1936. We cannot accept the contention of defendant. The 1936 act applied, with certain exceptions, to 'all civilian officers and employees of the United States . . . . ' None of the exceptions is pertinent here. Therefore we conclude that plaintiff's position as auditor for this court was within the coverage of the 1936 act.

354 F.2d at 305. Ruling that the records maintained by the employee "constitute satisfactory evidence of the amount of leave which he has accumulated," the court awarded plaintiff $3,515.

Shortly after this decision, the Comptroller General approved a similar claim by another former employee of the Court of Claims. The Comptroller General was "aware of nothing in the *Sauer* case or otherwise that would warrant our construing that case as having prospective application only," and therefore approved the

claim even though the date of the plaintiff's separation from the court preceded the date of the decision in *Sauer*. 45 Comp. Gen. 587 (1966).

The unanimity of these decisions makes it clear, in our view, that the exceptions in the Leave Act should be applied conservatively. Such an approach inevitably leads to the conclusion that full-time magistrates, bankruptcy judges and judges' staff should be included in the leave system.

At the same time, however, we recognize that this conclusion presents a host of practical problems, especially if applied retroactively. Annual and sick leave are not merely day-to-day "perks," but also constitute valuable benefits at the time of separation from the government. Upon resignation or retirement, employees may receive a lump-sum cash payment for unused annual leave totaling not more than 30 days (this, of course, was the basis for the claims in *Cain* and *Sauer*) or elect to have such leave remain to their credit until they return to government service (5 U.S.C. §§ 5552 and 6304). The potential for a cash distribution would undoubtedly be of interest, *inter alia*, to the many law clerks who used little, if any, leave during their service. Similarly, for employees retiring on immediate annuities or their survivors, the law provides that all unused sick leave (which accumulates without limitation) may be added to their total years of service for the purpose of calculating the size of their annuity (5 U.S.C. § 8339(m)). This could be of major significance to career personnel, such as judges' secretaries, who might retire with substantial sick leave balances.

If we were to change our policy retroactively, we would first have to determine how far back to apply the change. On the one hand, it could be argued that the need for a strict construction of the Leave Act was not required until 1978, but on the other hand there is direct decisional authority setting out the rules as to judges' staff from 1948. Depending on the date selected, we would have to contact many, if not all, living former employees and the recipients of survivors' annuities. It would then be necessary to calculate the payments due these persons, in the form of lump-sum distributions for unused annual leave and/or increased annuities reflecting unused sick leave. As in the *Cain* and *Sauer* cases, we would have to rely on the individuals to attest to the amount of unused leave they carried at the time of their separation. In light of the windfall to be received, it is doubtful how accurately or consistently these calculations would be made. And, of course, the financial impact upon the judiciary's appropriations could be substantial.

Even if we only change our policy as to current employees, many practical difficulties would remain. It would not seem fair to start long-standing employees with a leave balance of zero hours, and so some system of calculating past leave usage would have to be devised. As before, this could not be expected to be a precise procedure. Furthermore, as to bankruptcy judges and magistrates, it is doubtful that such officers would scrupulously fill in leave slips or otherwise account for each hour of their day. In fact, we understand that the operative assumption within this agency has been that magistrates' lack of exclusion from the Leave Act was an unintended congressional oversight. We understand that

magistrates were intended to be treated like bankruptcy judges, who will be exempt from the Leave Act when they become presidential appointees in April 1984.

In light of these practical difficulties, we had endeavored, within the limits of the law, to find some middle ground.

Recommendations. We propose that the Judicial Conference take the following actions:

1. *Judges' Personal Staff.* It should be directed that all *new* employees of circuit and district judges be placed under the statutory leave system. Existing staff may continue in their present status. *N.B.*: This recommendation represents a compromise which is founded on practicality, rather than the law. That is, there is no direct authority in the Leave Act for this position. The Conference should therefore be aware that existing and former employees may [sic] to those pursued in *Cain* and *Sauer.* While we do not believe this action will necessarily encourage such suits, the Conference must be advised that, in our view, such claims would likely succeed. Notwithstanding this potential liability, however, we feel strongly that this change must be made.

2. *Magistrates.* The Conference should direct that full-time magistrates (and, of course, part-time magistrates) may continue to be excluded from the leave system, but only for so long as appropriate amendments to the Leave Act are sought. We understand that bills of this nature have been sponsored in the past, and could easily be reintroduced. It is our feeling that as long as diligent

efforts are being made to formalize what was undoubtedly Congress' original intent, it would not be inappropriate to continue the present system. While legislation would technically need apply only to full-time magistrates, it would be preferable, in the interests of clarity, for the amendment to the Leave Act to specifically refer to both full-time and part-time magistrates.

3. *Bankruptcy Judges.* Finally, the Conference should endorse our view that bankruptcy judges may continue to be excluded from the Act. We take this position on the grounds that, as of 1984, bankruptcy judges will be presidential appointees and thus come within the existing statutory exclusion. We are aware that many bankruptcy positions will be occupied by incumbents (*i.e.*, non-presidential appointees) for a period of time under the hold-over provision of the Bankruptcy Reform Act, and that, technically, such officials could thus be brought under the leave system. Nonetheless, it is our belief that no valid governmental interest would be served by such action. First, this would raise all the problems of retroactivity discussed above. Second, only full-time judges could be brought in since part-time judges, like part-time magistrates, have no fixed tour of duty. This would be a ludicrous inconsistency. Third, and most significantly, the Bankruptcy Reform Act reflects a policy that bankruptcy judges are high level government officials for whom hour-by-hour accountability is inappropriate and unnecessary. Accordingly, we feel it would be both inefficient and unwarranted to place existing judges under the leave system for the short period of time between now and full implementation of the new bankruptcy law.

APPENDIX F

memorandum

May 18, 1983

William M. Nichols
General Counsel

Applicability of the Leave Act to Certain Officers and Employees in the Judicial Branch

William E. Foley
Director

Introduction. The Division of Personnel has asked us to restate our views concerning the applicability of the Leave Act (5 U.S.C. §§ 6301-6323) to United States magistrates, United States bankruptcy judges and the personal staff of circuit and district judges. Under current judicial branch regulations, officers in the first two categories are automatically excluded from the Leave Act, while members of a judge's personal staff are included or excluded at each judge's discretion.

It is clear in our view that this procedure is improper under the law. While we believe we have sufficient discretion to temporarily maintain the status quo as to magistrates and bankruptcy judges, we feel it is imperative that the Judicial Conference change its regulations to place law clerks, secretaries and other judicial staff employees under the leave system. In recognition of the many practical problems associated with the retroactive application of such a change, we propose that it be applied only to new employees. This compromise position may or may not be legally supportable, however, and there is the risk that current and former employees could,

as has occurred in the past, successfully sue for their leave benefits.

We are bringing this matter to your attention for reference to the appropriate committee of the Judicial Conference.

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On their face, these provisions appear to exclude only judges (as Presidential appointees) and part-time magistrates and bankruptcy judges (who do not have regular tours of duty). Regulations of the judicial branch, however, expand upon these exceptions. Since 1949, the Judicial Conference has authorized each judge to decide whether his or her personal staff is to be covered by the statutory leave system. See Volume III, *Guide to Judiciary Policies and Procedures,* Title XII, ¶ 10 and Exhibit XII-D. With regard to magistrates, section 1.2 of the Regulations of the Director of the Administrative Office of the United States Courts Governing the Administration of the United States Magistrate System [reprinted in Volume IX-A, *Guide to Judiciary Policies and* Procedures] provides that

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significance to career personnel, such as judges' secretaries, who might retire with substantial sick leave balances.

If we were to change our policy retroactively, we would first have to determine how far back to apply the change. On the one hand, it could be argued that the need for a strict construction of the Leave Act was not required until 1978, but on the other hand there is direct decisional authority setting out the rules as to judges' staff from 1948. Depending on the date selected, we would have to contact many, if not all, living former employees and the recipients of survivors' annuities. It would then be necessary to calculate the payments due these persons, in the form of lump-sum distributions for unused annual leave and/or increased annuities reflecting unused sick leave. As in the *Cain* and *Sauer* cases, we would have to rely on the individuals to attest to the amount of unused leave they carried at the time of their separation. In light of the windfall to be received, it is doubtful how accurately or consistently these calculations would be made. And, of course, the financial impact upon the judiciary's appropriations could be substantial.

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operative assumption within this agency has been that magistrates' lack of exclusion from the Leave Act was an unintended congressional oversight. We understand that magistrates were intended to be treated like bankruptcy judges, who will be exempt from the Leave Act when they become presidential appointees in April 1984.

In light of these practical difficulties, we had endeavored, within the limits of the law, to find some middle ground.

Recommendations. We propose that the Judicial Conference take the following actions:

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2. *Magistrates.* The Conference should direct that full-time magistrates (and, of course, part-time magistrates) may continue to be excluded from the leave system, but only for so long as appropriate amendments to the Leave Act are sought. We understand that bills of this nature have been sponsored in the past, and could easily

be reintroduced. It is our feeling that as long as diligent efforts are being made to formalize what was undoubtedly Congress' original intent, it would not be inappropriate to continue the present system. While legislation would technically need apply only to full-time magistrates, it would be preferable, in the interests of clarity, for the amendment to the Leave Act to specifically refer to both full-time and part-time magistrates.

3. *Bankruptcy Judges.* Finally, the Conference should endorse our view that bankruptcy judges may continue to be excluded from the Act. We take this position on the grounds that, as of 1984, bankruptcy judges will be presidential appointees and thus come within the existing statutory exclusion. We are aware that many bankruptcy judges will be occupied by incumbents (*i.e.*, non-presidential appointees) for a period of time under the holdover provision of the Bankruptcy Reform Act, and that, technically, such officials could thus be brought under the leave system. Nonetheless, it is our belief that no valid governmental interest would be served by such action. First, this would raise all the problems of retroactivity discussed above. Second, only full-time judges could be brought in since part-time judges, like part-time magistrates, have no fixed tour of duty. This would be a ludicrous inconsistency. Third, and most significantly, the Bankruptcy Reform Act reflects a policy that bankruptcy judges are high level government officials for whom hour-by-hour accountability is inappropriate and unnecessary. Accordingly, we feel it would be both inefficient and unwarranted to place existing judges under the leave system for the short period of time between now and full implementation of the new bankruptcy law.

APPENDIX G

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS

WASHINGTON, D.C. 20544

L. RALPH MECHAM
DIRECTOR

JAMES E. MACKLIN, JR.
DEPUTY DIRECTOR

November 27, 1987

MEMORANDUM TO ALL UNITED STATES JUDGES AND MAGISTRATES

SUBJECT: Applicability of Leave Act

There has been some confusion as to the meaning and implications of my April 10 and April 15, 1987 memoranda (attached), on the above subject. This memorandum should clarify the situation.

1. The Annual and Sick Leave Act at 5 U.S.C. 6301-6312, as amended by Public Law No. 95-519, effective November 6, 1978, *clearly* places all employees of the Judicial Branch under the provisions of the law except for judges appointed by the President.

2. *All* non-Presidential appointees who claim accumulated annual and sick leave, using appropriate records as prescribed by the Comptroller General, are *entitled* to those leave balances and, upon separation from the Government, to a lump-sum payment for unused annual leave. If retiring from a position so covered, they may also be entitled to credit of unused sick leave in the computation of their annuity.

3. The Administrative Office is required to honor all claims supported by appropriate documentation and will do so.

I should add that the Judicial Conference strongly disagrees with the policy underlying the current statute's application of the Leave Act to bankruptcy judges, magistrates, and law clerks to judges and magistrates. Legislation to amend the existing law has been submitted to Congress and introduced by Senator Heflin of Alabama. Nevertheless, until the present provision is amended, the judiciary is obliged to follow the policy of current law.

/s/ L. Ralph Mecham
L. Ralph Mecham

Attachments

APPENDIX H

UNITED STATES GOVERNMENT
memorandum

DATE: August 10, 1979

REPLY TO ATTN OF: Carl H. Imlay
General Counsel

SUBJECT: Coverage by Leave Act of Officers and Employees in the Judicial Branch

TO: Mr. R. Glenn Johnson

The enactment last year of an amendment clarifying the coverage of the Leave Act makes it desirable to reassess the categories of officers within the Judicial Branch who can be considered to fall outside the coverage of that Act.

As you know, the Congress in the Act of October 25, 1978, Public Law No. 95-519, 92 Stat. 1819, amended section 6301(2) of title 5, United States Code, to add, as an additional category of employees exempt from the coverage of the statutory leave provisions, "an officer in the legislative or judicial branch who is appointed by the President."

The legislative history of this amending legislation[1] took note of the fact that officers in the Executive Branch who are appointed directly by the President and employees of either house of the Congress were already exempt from the coverage of the statutory subchapter on

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[1] House Report No. 95-1496, 95 Cong., 2d Sess. (1978), reprinted in 1978 *U.S. Code Congressional and Administrative News* 4159.

leave "based on the fact that such officers never completely divest themselves of their responsibilities and actually are on duty at all times." It acknowledged further that Presidentially appointed officers in other branches of the Government had already been administratively excepted from the leave laws but found that some confusion had nevertheless existed with respect to the leave status of such officers. The report summarized the objective of this legislation as follows:

> "The committee amendment to S. 1626 would eliminate the confusion existing under current law by specifically excepting from the annual and sick leave provisions any officer in the legislative or judicial branch who is appointed by the President. Thus, as a result of the committee amendment, all Presidentially appointed officers in the three branches of the Government will be treated alike for purposes of annual and sick leave coverage."

It is my opinion that the enactment of the above legislation, in clarifying that judges of the courts of the United States are exempt from the Leave Act as the only officers within the Judicial Branch who are appointed by the President, effectively requires that we treat every other category of judicial officer and employee without exception as covered by the leave chapter in title 5 of the United States Code. Well recognized principles of statutory interpretation require that an enumeration of particular categories as within the coverage of a Congressional enactment must be interpreted as manifesting the intent

of the Congress to exclude other similar categories which are not enumerated.[2]

Thus the now-expressed designation of Presidentially appointed officers within the Judiciary as outside of the statutory leave coverage necessarily implies that all other judicial officers and employees must be deemed as within its coverage. This conclusion is further supported by the rationale expressed in the legislative history of the recent amendment, which is that the class of officials being exempted consists of those whose responsibilities are such that they are never completely divested but rather extend throughout the official's tenure in the office in question. Within the Judicial Branch this description seems uniquely suited to judges.

It is true that we have previously considered certain additional categories of officers in the Judicial Branch besides judges themselves as excepted from the Leave Act. For example, the Comptroller General of the United States held in his decision at 25 Comp. Gen. 808 (1946) that secretaries and law clerks to federal judges did not come within the Act's coverage. In so holding, this opinion stated that coverage under the statutory leave system "is not dependent upon considerations of the particular branch of the Federal Government in which employed, but, rather, is dependent solely upon a determination whether the nature of the employment is such as to be

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[2] This maxim of expressio unius est exclusio alterius is described at 2A Sutherland, *Statutory Construction* §§ 47.23 – 47.25 (4th ed. by Sands, 1973).

consistent with the grant of leave with pay therein provided." It was found that the hours of duty of the judges' secretaries and law clerks were not subject to any fixed schedule and that such employees were on many occasions in a non-work status for extended periods during which they remained in a pay status.[3] It is obvious that the factual premises upon which this decision was based have changed dramatically in the intervening years, with the increasing caseload imposed upon federal judges and the consequent elevation of their staffs to a full-time status in every respect. Further, the Congress has now made its finding with respect to the issue posed in the Comptroller General's decision, namely whether the nature of the employment is consistent with the statutory grant of leave, by enacting this 1978 amendment expressly exempting judges from leave coverage and implicitly including therein all other Judicial Branch officers and employees.

Thus I recommend that for the present you require the maintenance of leave records for all officers and employees within the Judicial Branch other than judges. It should be noted that the bankruptcy judge positions are for the present to be included within the leave system because their incumbents are not presently appointed by the President. When the 1978 bankruptcy law becomes fully effective in 1984, bankruptcy judges will then be Presidential appointees and will become exempt from the

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[3] *Contra, Cain v. United States*, 77 F. Supp. 505 (N.D. Ill., 1948), in which the Comptroller General's 1946 decision on this question was not followed.

statutory leave system by operation of 5 U.S.C. § 6301(2)(xiii), as added by Public Law No. 95-519.

I should also point out that S. 658 as recently passed by the Senate would further amend the 1978 bankruptcy law to exempt from the annual and sick leave laws United States magistrates and, during the transition period, bankruptcy judges. Unless and until such legislation becomes law, however, these two categories of judicial officers should be considered as covered by chapter 63 of title 5, like all other such officers except judges appointed pursuant to Article III of the Constitution.

cc: Robert Marsel, Esq.
Legal Officer of the Supreme Court

Jeannette Sisson
Federal Judicial Center

WRB:bew 8-10-79
Daybook - WRB, CHI
Mr. Foley
File -

APPENDIX I

IN THE UNITED STATES CLAIMS COURT

MARVIN D. CUTRIGHT, Plaintiff,	)	No. 172-88C
v.	)	
UNITED STATES OF AMERICA, Defendant.	)	

AFFIDAVIT OF MARVIN D. CUTRIGHT IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA	)	
	)	SS:
COUNTY OF ALLEGHENY	)	

Before me, the undersigned authority, personally appeared MARVIN D. CUTRIGHT who, being duly sworn according to law, deposes and says:

I am a retired official court reporter for the United States District Court for the Western District of Pennsylvania. Throughout my employment as an official court reporter, which began in 1958 to the time of my retirement in 1986, I was a full-time employee working in excess of 40 hours per week on behalf of the government.

I was appointed to my position by the Honorable Roby C. Thompson, Chief District Judge, United States District Court for the Western District of Virginia.

Judge Thompson explained that I had a duty to be available to report any proceedings, to promptly prepare transcripts, and to file a copy of the transcript with the Clerk, which transcript would become a public record. He explained that my position was full-time and permanent so long as my performance was satisfactory. He further explained that considerable travel time would be involved. I soon learned, however, that my duties were considerably more extensive. There were numerous record-keeping duties and reports, and I was to prepare transcripts of all arraignments, pleas and sentences and file copies of the transcripts with the Court. The Administrative Office enforced these requirements by withholding paychecks until satisfactory compliance. Clearly, I and other reporters could not accomplish our duties in a less than 40 hour week. This situation continued during my entire federal employment.

As an official court reporter, I was engaged in the performance of a federal function and was under the supervision of employees and officers of the government, including the Judicial Conference and the Administrative Office of United States Courts.

The Administrative Office, despite our long hours, only permitted reporters to report a small segment of their hours in computing hours worked. I did some independent legal research and discovered the *Cain* case, which indicated that the government's position was without merit. I approached the Justice Department to bring suit to force compliance with the Leave Act, and notified the government that I felt I was entitled to benefits. I did

not believe I could do more at that time without jeopardizing my employment. However, I retired shortly thereafter and filed this lawsuit.

Prior to 1984, I was not given any benefits under the Annual and Sick Leave Act, 5 U.S.C. § 6301, *et seq.* Despite the fact that in 1984, the Administrative Office of the United States Courts recognized that I and other official court reporters were entitled to certain benefits, we were denied other benefits that should have been provided under the Leave Act.

Since August 30, 1958 until my retirement from the federal service, I receive paychecks from the Administrative Office of the United States Courts. I was paid as a full-time employee, and my paychecks reflected compensation for working forty (40) hour weeks on behalf of the government. I was not a temporary or part-time employee.

After my retirement, I submitted a Standard Form 1150 to the government in December 1986, wherein I requested payment of annual and sick leave. The amount set forth therein are very conservative estimates of the amount I believe I am entitled to receive. Those amounts were claimed in an effort to avoid litigation.

Because the government neglected to keep Leave Act records for me prior to 1984, and because I was never required or requested to keep such records, I have calculated the amount of Leave to which I believe I am entitled based upon the language of the Leave Act, and based upon a good faith estimate of annual and sick leave taken. Sick leave was calculated on the basis of an accrual rate of on half (1/2) day for each. Given twenty-six (26)

bi-weekly pay periods per year, I accumulated thirteen (13) sick leave days per year. Other than one eye examination and one dental examination in 1984, I cannot recall ever using sick leave which I had accumulated. Therefore, I believe, in good faith, that I am entitled to at least 2,913 hours of sick leave benefits.

Annual leave was calculated at a rate of twenty (20) days per year from 1959 through 1973, and at a rate of twenty-six (26) days per year from 1974 through 1986. I estimate that I would have taken a maximum of fifteen (15) annual leave days in any given year. Thus, from 1959 to 1973, I accumulated five (5) days of unused annual leave per year. Thereafter, I accumulated eleven (11) days of unused annual leave per year. At least through 1983, I accumulated a total of 1,480 hours of unused annual leave. I am entitled to exceed the 240 hour limit set forth in the Leave Act statute because the government committed administrative error in failing to credit me with leave to which I was entitled and could have used, but for the government's improper actions.

Further, the affiant sayeth not.

/s/ Marvin D. Cutright
Marvin D. Cutright

SWORN AND SUBSCRIBED to me

this 28th day of July, 1989.

/s/ Kathleen G. Sweitzer
Notary Public

[SEAL]

APPENDIX J

IN THE UNITED STATES CLAIMS COURT

MARVIN D. CUTRIGHT, Plaintiff,	)	No. 172-88C
v.	)	
UNITED STATES OF AMERICA, Defendant.	)	

SUPPLEMENTAL AFFIDAVIT OF MARVIN D. CUTRIGHT IN SUPPORT OF HIS MOTION FOR SUMMARY JUDGMENT

COMMONWEALTH OF PENNSYLVANIA	)	
COUNTY OF ALLEGHENY	)	SS:

Before me, the undersign authority, personally appeared Marvin D. Cutright who, being duly sworn according to law, deposes and says:

I am a retired Official Court Reporter for the United States District Court for the Western District of Pennsylvania. Throughout my employment as an Official Court Reporter, which began in 1958 and ended with my retirement in 1986, I was a full-time employee of the government.

My Employee Earning Statements, issued by the Administrative Office of the United States Courts, have always indicated that I was full-time employee being paid for 80 hours work each bi-weekly pay period (40

hours per week). While I have not been able to locate all Earnings Statements dating from 1958, I am attaching hereto as Exhibit 1 a representative sample of Earnings Statements which I could locate for 1982, 1983, 1984, 1985 and 1986.

As indicated on the attached Earnings Statements, I was considered a 40-hour per week employee both prior to 1984 when the government (Administrative Office) finally acknowledged its error in excluding court reporters from the Leave Act, as well as after 1984.

I satisfied the requirements of a full-time court reporter set forth by the Judicial Conference, and in fact received longevity increases in salary and increases based on merit. I was considered a full-time employee by virtue of receiving longevity and merit increments to my salary.

I also note that the government's answers to Interrogatory 42 admit that full-time court reporters receive a salary and longevity increment, but that there are no such distinct salary rates for part-time employees. A copy of the government's responses are set forth in Exhibit 10, included in the Appendix to my Motion for Summary Judgment. Therefore, since I received longevity increments, I was considered a full-time employee.

In addition to full-time reporters such as myself, the course employed several reporters on an intermittent, part-time or temporary basis. These reporters would be hired by the Clerk of Courts or by me in my capacity as Chief Reporter. These temporary reporters would be paid on a "when-actually-employed" basis. I was always a full-time, salaried employee and never received compensation on a per diem or "when-actually-employed" basis.

My appointment as a court reporter, attached hereto as Exhibit 2, does not limit me to the status of a part-time or temporary employee. My appointment was considered to be as a full-time employee, and in fact I remained a full-time appointment from 1958 until my retirement in 1986.

I finally note that the Administrative Office's "Notice of Personnel Action" form, which was prepared upon my retirement, indicates that I was employed by the Judicial Branch of the government. I was a full-time officer of the court and was entitled to compensation on that basis. A copy of the Notice is attached hereto as Exhibit 3.

Further, the Affiant sayeth not.

/s/ Marvin D. Cutright
Marvin D. Cutright

Sworn to and subscribed

before me this 4 day

of September, 1990.

/s/ P. Lynn Anderson
Notary Public

[SEAL]

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DIS 8 (REV 12/85)

CIRCUIT	CT/DIVS	PCB	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PRD	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE	
03	PAH	202	198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	20	092886	1858

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF	SPECIAL ALLOW	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	3709000	800	142640	0	00	00	00		3	00	3	00	142640

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	TSP INSURANCE DEDUCTION REGULAR	TSP INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
9985	00	M	0	0	26273	YV2	2511	740	4180	00		00		00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	2995	62331	PAPB	0	0	00	00						

CTC DEDUCTION	FICA/MEDIC	SAVINGS ALLOTMENT	NET PAY
00	2068	00	93888

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CTC DEDUCTIONS	INS DEDUCTIONS	COLA
	2852800	525460	41360	199700	00	50426	00	114560	00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL	NOTES
			364360	00	

OPT LIFE INSUR DED INCLUDES STD ADDTL 41.80 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DIS 8 (Rev. 2/86)

CIRCUIT	CT/DIVS	PCB	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PRD	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE	
03	PAH	202	198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	19	091486	1896

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	3709000	800	142640	0	00	00	00		3	00	3	00	142640

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	TSP INSURANCE DEDUCTION REGULAR	TSP INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
9985	00	M	0	0	26273	YV2	2511	740	4180	00		00		00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	2995	59336	PAPB	0	0	00	00						

CTC DEDUCTION	FICA/MEDIC	SAVINGS ALLOTMENT	NET PAY
00	2068	00	93888

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CTC DEDUCTIONS	INS DEDUCTIONS	COLA
	2710180	499187	39292	189715	00	47915	00	109640	00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL	NOTES
	000000		363360	00	

OPT LIFE INSUR DED INCLUDES STD ADDTL 41.80 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DIS 8 (Rev. 2/86)

CIRCUIT	CT/DIST	PCD	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PROG	FED PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE	
03	PA/202		198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	18	083186	1872

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF	SPECIAL ALLOW	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	3709000	80.0	142640	0	00	00	00			00		00	142640

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
9985	00	M	0	0	28273	YV2	2511	740	4180	00		00		00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	2995	56341	PAPB	0	0	00	00				

CFC DEDUCTION	FICA/MEDIC	SAVINGS ALLOTMENT	NET PAY
00	2068	00	93888

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CFC DEDUCTIONS	MIS DEDUCTIONS	COLA
	2567520	472914	37224	179730	00	45404	00	104720	00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL
	000000		3623633	00

NOTES:

OPT LIFE INSUR DED INCLUDES STD ADDTL 41.80 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DIS 8 (REV 12/91)

CIRCUIT	CT/DIST	PCD	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PROG	FED PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE	
03	PA/202		198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	17	081786	1841

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF	SPECIAL ALLOW	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	3709000	80.0	142640	0	00	00	00			00		00	142640

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
9985	00	M	0	0	26273	YV2	2511	740	4180	00		00		00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	3138	53346	PAPB	0	0	00	00				

CFC DEDUCTION	FICA/MEDIC	SAVINGS ALLOTMENT	NET PAY
00	2068	00	93745

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CFC DEDUCTIONS	MIS DEDUCTIONS	COLA
	2424930	446641	35136	169745	00	42893	00	99800	00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL
	000000		3613668	00

NOTES:

OPT LIFE INSUR DED INCLUDES STD ADDTL 41.80 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/ORG	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PLAN	FID PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD END DATE	
03	PAW	202	198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	25	120885	1774

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF	SPECIAL ALLOW	OTHER PAY CODE 3	OTHER PAY AMOUNT	OTHER PAY CODE 3	OTHER PAY AMOUNT	GROSS PAY
A	3709000	800	142640	0	00	00	00			00		00	142640

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO /EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PAY PERIOD	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT
9985	00	M	0	0	27009	W2	2717	800	5130	00		00		00

STATE TAX CODE	STATE TAX NO /EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO /EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	3352	83687	PAPB	0	0	00	00						

CIC DEDUCTION	FICA/MEDIC	SAVINGS ALLOTMENT	NET PAY
00	1926	00	91721

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIC DEDUCTIONS	MIS DEDUCTIONS	COLA
	3561200	677566	48085	249289	00	68011	00	100130	00

WOI DUE PP	WOI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL
	000000		3433918	00

NOTES

OPT LIFE INSUR DED INCLUDES STD ADDTL 51.30 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/ORG	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PLAN	FID PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD END DATE	
03	PAW	202	198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	24	112485	1767

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST. DIFF	SPECIAL ALLOW.	OTHER PAY CODE 3	OTHER PAY AMOUNT	OTHER PAY CODE 3	OTHER PAY AMOUNT	GROSS PAY
A	3709000	800	142640	0	00	00	00			00		00	142640

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO /EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PAY PERIOD	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT
9985	00	M	0	0	27009	W2	2717	800	5130	00		00		00

STATE TAX CODE	STATE TAX NO /EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO /EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	3352	80335	PAPB	0	0	00	00						

CIC DEDUCTION	FICA/MEDIC	SAVINGS ALLOTMENT	NET PAY
00	1926	00	91721

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIC DEDUCTIONS	MIS DEDUCTIONS	COLA
	3418560	650557	46159	239304	00	65294	00	96200	00

WOI DUE PP	WOI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL
	000000		3423933	00

NOTES

OPT LIFE INSUR DED INCLUDES STD ADDTL 51.30 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DFS 8 (REV 12/74)

CIRCUIT	CT/DIST	PCD	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY INCD	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE	
02	PAMP02		198-24-0237	CUTRIGHT.MARVIN D	3	CP	00	03	22	110775	1771

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF	SPECIAL ALLOW	NDBA PAY CODE	NDBA PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
1A	37090.00	80.0	1426.40	0	00	00	00		3	00	3	00	1426.40

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO /EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INCOME/SS COLLECTIONS CODE	INCOME/SS COLLECTIONS AMOUNT	INCOME/SS COLLECTIONS CODE	INCOME/SS COLLECTIONS AMOUNT
2985	00	M	0	0	27009	AV2	2737	5.10	1.30	00		00		00

STATE TAX CODE	STATE TAX NO /EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO /EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
LL	0	0	33.52	769.03	PAPB	0	0	00	00						

CIVIC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
00	19.26	00	917.21

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIVIC DEDUCTIONS	INS DEDUCTIONS	COLA
	32759.00	6235.48	442.13	2294.39	00	625.77	00	882.70	00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL	NOTES
	000000		3413.90	00	

OPT LIFE INSUR DED INCLUDES STD ADDTL $1.30 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DFS 8 (REV 12/74)

CIRCUIT	CT/DIST	PCD	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY INCD	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE	
02	PAMP02		198-24-0237	CUTRIGHT.MARVIN D	3	CP	00	03	22	102775	1754

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF	SPECIAL ALLOW	NDBA PAY CODE	NDBA PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
1A	37090.00	80.0	1426.40	0	00	00	00		3	00	3	00	1426.40

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO /EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INCOME/SS COLLECTIONS CODE	INCOME/SS COLLECTIONS AMOUNT	INCOME/SS COLLECTIONS CODE	INCOME/SS COLLECTIONS AMOUNT
2985	00	M	0	0	27009	AV2	2737	8.00	5.80	00		00		00

STATE TAX CODE	STATE TAX NO /EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO /EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
LL	0	0	33.52	736.31	PAPB	0	0	00	00						

CIVIC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
00	19.26	00	917.21

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIVIC DEDUCTIONS	INS DEDUCTIONS	COLA
	31332.60	5965.39	423.07	2193.74	00	598.60	00	823.80	00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL	NOTES
	000000		3403.63	00	

OPT LIFE INSUR DED INCLUDES STD ADDTL $1.30 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS – EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/DIST	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PRD	TYP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO.	PAY PERIOD ENDING DATE	
03	PAW	202	198-24-0237	CUTRIGHT,MARVIN D	A	CR	00	03	21	101484	1702

SALARY TYPE	SALARY RATE	REGULAR HRS.	REGULAR PAY	LUMP SUM HRS.	LUMP SUM PAY	COLA	POST. DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	35836.00	80.0	1378.40	0	.00	.00	.00		3	.00	3	.00	1378.40

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO./EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
96.49	.00	M	0	0	262.10	YV2	28.03	8.36	19.44	.00		.00		.00

STATE TAX CODE	STATE TAX NO./EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO./EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	32.39	698.12	PAPB	0	0	.00	.00						

CFC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
.00	17.92	.00	913.67

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CFC DEDUCTIONS	INS. DEDUCTIONS	COLA
	28893.60	5486.71	375.67	2022.57	.00	584.67	.00	612.16	.00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.	NOTES
	00000		31363.84	.00	

OPT LIFE INSUR DED INCLUDES STD ADDTL 19.44 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS – EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/DIST	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PRD	TYP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO.	PAY PERIOD ENDING DATE	
03	PAW	202	198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	20	093084	1714

SALARY TYPE	SALARY RATE	REGULAR HRS.	REGULAR PAY	LUMP SUM HRS.	LUMP SUM PAY	COLA	POST. DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	35836.00	80.0	1378.40	0	.00	.00	.00		3	.00	3	.00	1378.40

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO./EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
96.49	.00	M	0	0	262.10	YV2	28.03	8.36	19.44	.00		.00		.00

STATE TAX CODE	STATE TAX NO./EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO./EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	32.39	665.73	PAPB	0	0	.00	.00						

CFC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
.00	17.92	.00	913.67

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CFC DEDUCTIONS	INS. DEDUCTIONS	COLA
	27515.20	5224.61	357.75	1926.08	.00	556.64	.00	584.36	.00

WGI DUE PP	WGI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.	NOTES
	00000		31267.35	.00	

OPT LIFE INSUR DED INCLUDES STD ADDTL 19.44 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/ORG	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PLAN	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE
03	PAH	202	198-24-0237	CUTRIGHT,MARVIN D	P	CR	00	03	19	091684

1757

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	358600	800	137840	0	:00	:00	:00		3	:00	3	:00	137840

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INCAPACITY SS COLLECTIONS CODE	INCAPACITY SS COLLECTIONS AMOUNT	INCAPACITY SS COLLECTIONS CODE	INCAPACITY SS COLLECTIONS AMOUNT
9649	:00	2 M	0	0	26210	YV2	2803	A36	1944	:00		:00		:00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	3239	63334	PAPB	0	0	:00	:00						

CTC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
:00	1792	:00	91367

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CTC DEDUCTIONS	INS. DEDUCTIONS	COLA
	2613680	496251	33983	182959	:00	52861	:00	55656	:00

WHS DUE PP	WHS DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.	NOTES
	000000		3117086	:00	

OPT LIFE INSUR DED INCLUDES STD ADDTL 19.44 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/ORG	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PLAN	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE
03	PAH	202	198-24-0237	CUTRIGHT,MARVIN D	B	CR	00	03	18	090284

1916

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	358600	800	144280	0	:00	:00	:00		3	:00	3	:00	144280

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	LIFE INSURANCE DEDUCTION REGULAR	LIFE INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INCAPACITY SS COLLECTIONS CODE	INCAPACITY SS COLLECTIONS AMOUNT	INCAPACITY SS COLLECTIONS CODE	INCAPACITY SS COLLECTIONS AMOUNT
10142	:00	2 M	0	0	28534	YV2	2803	A36	1944	:00		:00		:00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	3905	60095	PAPB	0	0	:00	:00						

CTC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
:00	1884	:00	95337

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CTC DEDUCTIONS	INS. DEDUCTIONS	COLA
	2475840	470041	32191	173310	:00	50058	:00	52876	:00

WHS DUE PP	WHS DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.	NOTES
	000000		3107437	:00	

OPT LIFE INSUR DED INCLUDES STD ADDTL 19.44 FAM

A RETROACTIVE SALARY ADJUSTMENT IN THE AMOUNT OF 70.40 IS INCLUDED IN YOUR GROSS.

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DHS 8 (REV 12/79)

CIRCUIT	CT/DIST	PCD	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PLAN	TYPE PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE
03	PAW	202	198-24-0237	CUTRIGHT, MARVIN D	A	CR	00	03	06	03/20/81

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST. DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	34458.00	80.0	1325.60	0	.00	.00	.00		3	.00	3	.00	1325.60

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD'L W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	FEGLI INSURANCE DEDUCTION REGULAR	FEGLI INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
92.79	.00	M	D	0	272.02	YV2	24.07	A88	21.00	.00		.00		.00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD'L W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD'L W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	D	0	29.16	179.96	PAPB	0	0	.00	.00						

CIC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
.00	17.23	.00	860.45

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIC DEDUCTIONS	INS. DEDUCTIONS	COLA
	7953.60	1632.12	103.38	556.74	.00	150.12	.00	179.28	.00

WHI DUE PP	WHI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.
	00/00/00			.00

NOTES

OPT LIFE INSUR DED INCLUDES STD ADDTL 21.00 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

DHS 8 (REV 12/79)

CIRCUIT	CT/DIST	PCD	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PLAN	TYPE PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE
03	PA	202	198-24-0237	CUTRIGHT, MARVIN D	A	CR	00	03	05	03/06/81

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST. DIFF.	SPECIAL ALLOW.	OTHER PAY CODE	OTHER PAY AMOUNT	OTHER PAY CODE	OTHER PAY AMOUNT	GROSS PAY
A	34458.00	80.0	1325.60	0	.00	.00	.00		3	.00	3	.00	1325.60

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO/EX	FEDERAL TAX ADD'L W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	FEGLI INSURANCE DEDUCTION REGULAR	FEGLI INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT	INDEBTEDNESS COLLECTIONS CODE	INDEBTEDNESS COLLECTIONS AMOUNT
92.79	.00	M	0	0	272.02	YV2	24.07	A88	21.00	.00		.00		.00

STATE TAX CODE	STATE TAX NO/EX	STATE TAX ADD'L W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO/EX	LOCAL TAX ADD'L W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	29.16	145.80	PAPB	0	0	.00	.00						

CIC DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
.00	17.2.	.00	860.45

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIC DEDUCTIONS	INS. DEDUCTIONS	COLA
	6628.00	1360.10	86.15	463.95	.00	1260.[illegible]	.00	1494.0	.00

WHI DUE PP	WHI DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.
	00/00/00			.00

NOTES

OPT LIFE INSUR DED INCLUDES STD ADDTL 21.00 FAM

662.80 AWK

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/DIV	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PRD	FED PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE
03	PAW	202	198-24-0737	CUTRIGHT,MARVIN D	B	CR	00	03	03	020683

1624

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIF.	SPECIAL ALLOW.	OTHER PAY CODE 3	OTHER PAY AMOUNT	OTHER PAY CODE 3	OTHER PAY AMOUNT	GROSS PAY
A	34459.00	80.0	1325.60	0	.00	.00	.00			.00		.00	1325.60

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO /EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	TSP INSURANCE DEDUCTION REGULAR	TSP INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT
92.79	.00	M	0	0	272.02	YV2	24.07	BBB	21.00	.00		.00		.00

STATE TAX CODE	STATE TAX NO /EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO /EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	29.16	116.64	PAPA	0	0	.00	.00						

CIVIL SERVICE RETIREMENT DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
.00	17.23	.00	86.05

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIVIL SERVICE RETIREMENT DEDUCTIONS	MISCELLANEOUS DEDUCTIONS	COLA
	5302.40	1088.08	68.92	371.16	.00	101.98	.00	119.52	.00

WHS DUE PP	WHS DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.
	000000			.00

NOTES

OPT LIFE INSUR DED INCLUDES STD ADDTL 21.00 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CT/DIV	PCO	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	PAY PRD	FED PAY SYSTEM	GRADE	STEP	PAY PERIOD NO	PAY PERIOD ENDING DATE
03	PAW	202	198-24-0737	CUTRIGHT,MARVIN D	B	CR	00	03	03	020683

1621

SALARY TYPE	SALARY RATE	REGULAR HRS	REGULAR PAY	LUMP SUM HRS	LUMP SUM PAY	COLA	POST DIF.	SPECIAL ALLOW.	OTHER PAY CODE 3	OTHER PAY AMOUNT	OTHER PAY CODE 3	OTHER PAY AMOUNT	GROSS PAY
A	34459.00			0	.00	.00	.00			.00		.00	1325.60

CSR DEDUCTION	JSAS DEDUCTION	FEDERAL TAX MS	FEDERAL TAX NO /EX	FEDERAL TAX ADD W/H	FEDERAL TAX DEDUCTION	HEALTH BENEFITS PLAN	HEALTH BENEFITS DEDUCTION	TSP INSURANCE DEDUCTION REGULAR	TSP INSURANCE DEDUCTION OPTIONAL	BOND DEDUCTION	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT	MISCELLANEOUS COLLECTIONS CODE	MISCELLANEOUS COLLECTIONS AMOUNT
92.79	.00	M	0	0	272.02	YV2	24.07	BBB	21.00	.00		.00		.00

STATE TAX CODE	STATE TAX NO /EX	STATE TAX ADD W/H	STATE TAX AMOUNT	STATE TAX YTD AMOUNT	LOCAL TAX CODE	LOCAL TAX NO /EX	LOCAL TAX ADD W/H	LOCAL TAX AMOUNT	LOCAL TAX YTD AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT	OTHER DEDUCTIONS CODE	OTHER DEDUCTIONS AMOUNT
PA	0	0	29.16	87.48	PAPA	0	0	.00	.00						

CIVIL SERVICE RETIREMENT DEDUCTION	FICA	SAVINGS ALLOTMENT	NET PAY
.00	17.23	.00	86.05

CALENDAR YEAR TOTALS	GROSS PAY	FEDERAL TAX	FICA DEDUCTIONS	CSR RETIREMENT DEDUCTIONS	JSAS DEDUCTIONS	HEALTH DEDUCTIONS	CIVIL SERVICE RETIREMENT DEDUCTIONS	MISCELLANEOUS DEDUCTIONS	COLA
	3976.80	816.06	51.69	278.37	.00	77.91	.00	89.64	.00

WHS DUE PP	WHS DUE DATE	CUMULATIVE JSAS DEDUCTIONS	CSR DEDUCTIONS CURRENT TOUR	BOND BAL.
	000000			.00

NOTES

OPT LIFE INSUR DED INCLUDES STD ADDTL 21.00 FAM

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS - EMPLOYEE'S EARNINGS STATEMENT

CIRCUIT	CTRORG	POS	SOCIAL SECURITY NUMBER	EMPLOYEE NAME	TSP PAY SYSTEM	GRADE	STEP	PAY PERIOD NO.	PAY PERIOD ENDING DATE
03	PAW	202	198-24-0237	CUTRIGHT, MARVIN D	CR	00	03	16	072582

1599

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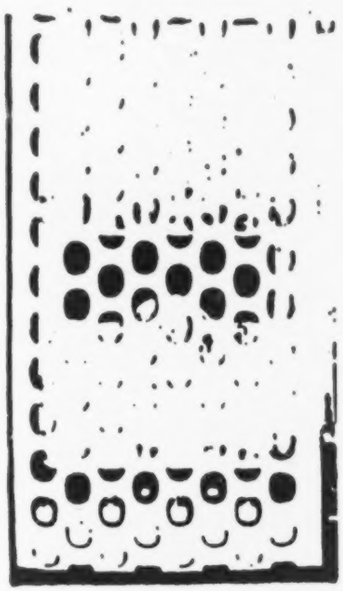

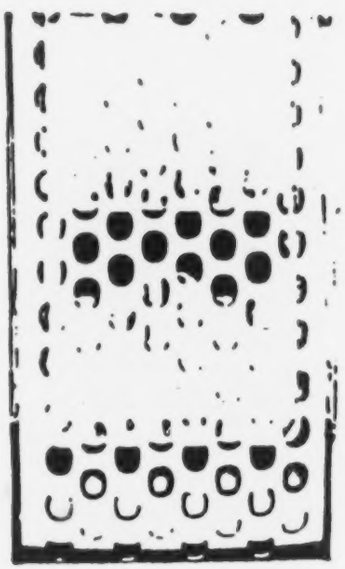

Supreme Court, U.S.
FILED
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No. 91-1897

In The

Supreme Court of the United States

October Term, 1992

MARVIN D. CUTRIGHT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF AMICUS CURIAE UNITED STATES COURT REPORTERS ASSOCIATION IN SUPPORT OF PETITIONER MARVIN D. CUTRIGHT

STEPHEN M. JOSEPH
JOSEPH, ROBISON & ANDERSON, P.A.
209 East William, Suite 800
Wichita, Kansas 67202-4013
(316) 262-0667

Attorney for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Whether appointed federal court reporters are full-time employees of the government who are entitled to benefits under the Annual and Sick Leave Act, 5 U.S.C. § 6301.

2. Whether the deprivation of vested annual and sick leave benefits constitutes an improper taking of property in violation of the due process clause of the Constitution of the United States when those benefits are deprived by a government agency's administrative fiat which is contrary to a clear and unambiguous statute of the United States Congress.

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. Marvin D. Cutright, an individual; and

2. The United States of America.

The United States Court Reporters Association ("USCRA") submits this Brief *Amicus Curiae* in support of the Petition of Marvin D. Cutright. All parties in this matter have consented to the filing of this Brief as required by Supreme Court Rule 37.2. Those consents accompany this Brief.

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The United States Court Reporters Association ("USCRA") respectfully prays, in support of Marvin D. Cutright, that a writ of certiorari issue to review the Order and Opinion of the United States Court of Appeals for the Federal Circuit entered in this proceeding on January 14, 1992 (Rehearing denied on March 5, 1992).

INTEREST OF THE AMICUS CURIAE

The United States Court Reporters Association ("USCRA") was formed in 1945 and has been committed since that time to serving and representing the interests of federal reporters throughout the United States appointed under 28 U.S.C. § 753. The USCRA is governed by a Board of Directors composed of one federal reporter from each circuit. There are approximately 650 federal reporters serving the federal courts in this country.

The United States Court of Appeals for the Federal Circuit held on January 14, 1992, that Marvin D. Cutright, a retired federal court reporter and Petitioner herein, was a "part-time" employee who was excluded from Leave Act coverage prior to 1984 because he was not assigned a "regular tour of duty during the administrative work week."[1] (*See* Appendix A of Marvin D. Cutright's Petition for Writ of Certiorari). Since this ruling will affect many of its members, the USCRA files this brief in support of Petitioner.

[1] In January, 1984, court reporters were given a "regular tour of duty" as part of their assignments, purportedly in an attempt to justify the government's argument that court reporters have always been "part-time" employees.

In so ruling, the United States Court of Appeals for the Federal Circuit changed a long-standing presumption that Leave Act benefits are to be afforded to all federal workers absent a specific statutory exception. The lower court allowed the Administrative Office of the United States Courts, by agency fiat, to unilaterally redefine the terms and conditions of the Leave Act to exclude an entire class of federal employees from coverage without a Congressional mandate to permit the exclusion.

The lower court's holding also deprives Petitioner, and potentially other federal court reporters, of vested property rights in violation of the Constitution of the United States.

This Brief of *Amicus Curiae* is respectfully submitted in support of Marvin D. Cutright's Petition for Writ of Certiorari. USCRA believes that this Honorable Court should remedy the clear injustice done to Mr. Cutright and should reverse a ruling that casts doubt on the applicability of the Leave Act to all federal reporters by improperly classifying them as "part-time" employees despite their employment records as appointed full-time, salaried federal employees.

SUMMARY OF ARGUMENT

Leave Act benefits are afforded to the vast majority of federal workers. Only those expressly excluded by statute are not entitled to receive benefits. Court reporters are not among any of the specifically-enumerated exceptions to Leave Act coverage. 5 U.S.C. § 6301(2)(i)-(xiii).

The United States' position is clearly erroneous and overreaching. Most, if not all federal reporters, including Marvin D. Cutright, should be recognized as full-time employees both prior to January, 1984, and subsequently. There is no need to give federal reporters a "regular tour of duty" in order to make them eligible for Leave Act benefits. Such a reclassification was, and is, a sham to avoid paying full-time reporters their entitlements under the Leave Act. The government has admitted that court reporters should be recognized as having full-time status and has implicitly and expressly recognized the full-time nature of a court reporter's appointment by virtue of its past conduct.

Failure to acknowledge a federal reporter's rights to vested Leave Act benefits constitutes an unwarranted and unconstitutional deprivation of property without due process of law since those rights are mandated by Congress and are a part of the important benefits court reporters have an interest in receiving.

ARGUMENT

I. APPOINTED FEDERAL COURT REPORTERS ARE EMPLOYEES WITHIN THE MEANING OF THE ANNUAL AND SICK LEAVE ACT.

The government contends that Marvin D. Cutright and, by implication, other federal reporters are excluded from coverage under the Leave Act because they were not placed on a "regular tour of duty" prior to 1984 as required by § 6301(2)(B)(ii) of the Leave Act, 5 U.S.C. § 6301(2). The "regular tour of duty" exception applies

only to part-time employees, according to the explicit language of § 6301. Therefore, if an employee works full-time for the government, the "regular tour of duty" exception does not apply.

The vast majority of appointed[2] federal court reporters are full-time employees of the government. The Court Reporter's Act, 28 U.S.C. § 753, which authorizes the appointment and use of official court reporters by district courts, gives absolutely no indication that appointed court reporters are to be treated as part-time employees. On the contrary, a fair reading of the Court Reporter's Act supports the full-time nature of their appointments. For example, the Act itself distinguishes between reporters "appointed" by a district court and reporters who are hired for "temporary service." 28 U.S.C. § 753(a). Furthermore, the Court Reporter's Act mandates that each appointed reporter "shall receive an annual salary to be fixed from time to time by the Judicial Conference of the United States." 28 U.S.C. § 753(e). As indicated, *infra*, this annual salary reflects 40 hours of work per week – a full-time schedule. Additionally, subsection (g) of the Court Reporter's Act provides for employment of reporters on a contract basis (rather than appointment) in certain situations. 28 U.S.C. § 753(g). Again, this supports the distinction between full-time appointed reporters and those employed on a temporary or part-time basis.

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[2] It has been held that appointment to federal service is *sine qua non* evidence of employment status. *See Horner v. Acosta*, 803 F.2d 687 (Fed. Cir. 1986); *Goutos v. United States*, 212 Ct. Cl. 95, 552 F.2d 922 (Ct. Cl. 1976).

The courts have also drawn a clear distinction between full-time reporters, *i.e.* those appointed pursuant to the Court Reporter's Act, and "contract" or part-time reporters. In *Goldhaber v. Foley*, 519 F. Supp. 466 (E.D. Pa. 1981), a bankruptcy judge and two court reporters serving the bankruptcy court brought an action seeking to enjoin the Administrative Office of the United States Courts from putting into effect a court reporting contract with reporters hired on a part-time basis to replace the "full-time salaried employees." While the court concluded that, in the bankruptcy context, full-time reporters could be replaced with part-time "contract" reporters by the Administrative Office, it made a *clear* distinction between "full-time salaried" reporters appointed by the court and part-time "contract" reporters hired by the Administrative Office. In allowing the "full-time" reporters to be replaced by "contract" reporters, the court saw a difference between reporters appointed pursuant to the Bankruptcy Reform Act, *see* 28 U.S.C. § 773(a), and the Court Reporter's Act. In the court's opinion, the Bankruptcy Reform Act is permissive with respect to the appointment of full-time reporters, whereas the Court Reporter's Act is mandatory in the sense that it requires the appointment of *at least* one full-time salaried reporter for each district court. 519 F. Supp. at 477. The Federal Circuit's opinion below, however, denies the existence of such full-time salaried reporters.

Thus, even the courts have recognized the full-time status of appointed, salaried court reporters. Indeed, the Administrative Office of the United States Courts, the agency involved in the present case, implicitly acknowledged this distinction by seeking to replace salaried

employees with part-time employees in bankruptcy courts in *Goldhaber*.

As set forth at length in Marvin D. Cutright's Petition, the Leave Act is very explicit in setting forth categories of federal employees which are not to be included in the Leave Act. 5 U.S.C. § 6301(2). Indeed, Congress goes to great length to specifically exclude different types of employees (*e.g.*, teacher, librarian, physician). Official court reporters are not explicitly excluded from coverage. Even though Congress had ample opportunity to exclude court reporters from Leave Act coverage when it amended it in 1978, it failed to do so.[3] If Congress had intended to exclude court reporters from Leave Act coverage, it had the ability and opportunity to do so in 1978. Its failure to create a specific exclusion is strong evidence supporting coverage of federal court reporters.

As pointed out in Marvin D. Cutright's Petition, it appears that the United States has long recognized the clarity of the Leave Act statute. (*See* Appendices E-H of Marvin D. Cutright's Petition). Statements such as "it is clear in our view that this procedure [of excluding court staff from Leave Act coverage] is improper under the law (Appendix F of Petition, pp. 52a-53a)" and that the Leave

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[3] Clause (XII) to subsection (2)(B), excluding "any officer of the legislative or judicial branch who is appointed by the President" from Leave Act coverage. The express congressional purpose of the amendment was to "clarify existing law by specifically excepting all presidentially appointed officers in the legislative and judicial branches from the annual and sick leave provisions" of the Act. *Legislative History of P.L. 95-519*, 92 Stat. 4160. Congress also noted that the Annual and Sick Leave Act applies "to the vast majority of federal employees." *Id.*

Act "clearly places all employees of the judicial branch under the provisions of the law except for judges appointed by the President" (Appendix G to the Petition, p. 61a) clearly demonstrate the government's knowledge of the administrative error involved in failing to include court reporters and other full-time employees in the Leave Act system prior to 1984. Thus the United States, while publicly contending that there was a "clear" exclusion of federal court reporters as "part-time employees," secretly acknowledged in internal correspondence and legal memoranda that employees such as court reporters should have been included in the leave system, and that their exclusion was erroneous.

The United States' conduct supports the position that Marvin D. Cutright and other federal reporters were full-time employees prior to 1984. For example, earning statements issued by the Administrative Office clearly indicate that appointed reporters were considered full-time employees. As exemplified in the earnings statements submitted with Mr. Cutright's Petition (Appendix J, pp. 75a-83a), Mr. Cutright and other appointed reporters were paid an annual salary (as required by the Court Reporter's Act) which was reflected on the statements. The statements further reflect payment for two full work weeks (totalling 80 hours), another tacit admission of a reporter's full-time status.

Furthermore, the *Guide to Judiciary Policies and Procedures: Court Reporter's Manual,* published by the Administrative Office, states that all official court reporters who have completed ten years of *full-time* service as a court reporter for a United States District Court shall receive a longevity increase in pay. *Court Reporter's Manual,* Vol. VI,

Ch. 5 (*see* Appendix B to Marvin D. Cutright's Petition, p. 22a). This constitutes a further tacit recognition by the government that court reporters should be treated as full-time employees. In fact, Marvin D. Cutright and most other court reporters who the government contends were "part-time" reporters, received and are receiving longevity increases based on the above provision. (*See* Appendix J to Marvin D. Cutright's Petition, p. 73a).

While this Honorable Court has not addressed the issue of administrative attempts to circumvent the statutory language of the Leave Act, the lower courts have found such attempts to be improper. For example, in *Cain v. United States*, 77 F. Supp. 505 (N.D. Ill. 1948),[4] the court rejected the Comptroller General's report that secretaries and law clerks were part-time employees. The District Court held that the language of the Leave Act is plain, clear and unequivocal, and does not specifically exclude judicial secretaries or law clerks. It noted that "Congress . . . should make the exception, not the Comptroller General or the courts." 77 F. Supp. at 508. *See also, Sauer v. United States*, 173 Ct. Cl. 642, 354 F.2d 302 (Ct. Cl. 1965) (an auditor of the Court of Claims was entitled to lump sum distribution for accumulated leave upon retirement).

In the present case, the United States is unable to point to any specific exception excluding federal court reporters from Leave Act coverage. Instead, in an attempt to circumvent congressional intent and general rules of

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[4] In an effort to avoid repetition, USCRA refers the Court to the more complete analysis of *Cain* set forth in Marvin D. Cutright's Petition.

statutory construction, the government attempts to "pigeon hole" court reporters into an exception to the definition of employee which, it is respectfully submitted, has no applicability whatsoever to court reporters.

Despite the overwhelming evidence to the contrary, the United States and the lower court concluded that appointed federal court reporters are part-time employees solely because they are able to augment their incomes by receiving compensation from private sources. First, the government fails to explain how the ability to receive compensation from private sources translates into an exclusion under the Leave Act. "Freelancing" is not barred by statute or regulation. Federal court reporters fall squarely within the Leave Act definition of "employee," and unless Congress sees fit to amend the Act to make a specific exclusion, any employee falling with in the parameters of that definition is entitled to Leave Act benefits.

Additionally, the Court Reporter's Act, 28 U.S.C. § 753, specifically authorizes the collection of fees for transcripts requested by the parties, "at rates prescribed by the court subject to the approval of the Judicial Conference." 28 U.S.C. § 753(f). Thus, Congress envisioned the ability of court reporters to collect private compensation over and above the salary paid by the United States, and in fact regulated the amount of that compensation via the supervision of the courts and the Judicial Conference. Yet Congress did not see fit to specifically designate court reporters as part-time employees or to expressly exclude reporters from the broad coverage of the Leave Act. While the United States will seek to have the Court take

"judicial notice" of the "fact" that court reporters "freelance," there is absolutely nothing in the record before this Court to confirm this "fact," let alone any evidence that any "freelancing" impinges on their duties to the district courts.

In any event, it is respectfully submitted that any such "freelancing" is irrelevant to the issues before this Court. By virtue of their employment with the federal government and their receipt of a full-time salary, court reporters are obligated to perform services for the government, and indeed perform vital full-time services for the government. *See Goldhaber v. Foley*, 519 F. Supp. 466, 482 (E.D. Pa. 1981) ("The court is well aware of the value of a court reporter who is not only competent but also loyal and accountable to the court."). This does not mean, however, that a reporter's "free time" should be restricted or that the productive use of that "free time" should enable the government to circumvent the clear entitlement to Leave Act benefits.

II. THE REFUSAL TO CREDIT APPOINTED FULL-TIME FEDERAL COURT REPORTERS WITH LEAVE ACT BENEFITS IS A DEPRIVATION OF PROPERTY WITHOUT DUE PROCESS OF LAW.

Despite the Administrative Office's insistence to the contrary, Congress, the courts and, indeed, the Administrative Office (by way of admissions set forth above) clearly intended federal court reporters to fall within the broad definition of "employee" as defined by 5 U.S.C. §§ 2105 and 6301. Furthermore, Congress intended to

create an entitlement or property right to Leave Act benefits for all eligible employees. *See* 5 U.S.C. §§ 6303(a) and 6307.

Of course, it is fundamental that a person who has a property right cannot be deprived of that right without due process of law. *U. S. Const.*, Amend. V; *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L.Ed.2d 548 (1972).

Yet that is precisely what the government agency involved here is attempting to do by unilaterally refusing to make payment of statutory benefits to their loyal full-time employees.

CONCLUSION

For the reasons set forth above, the United States Court Reporter's Association, as *amicus curiae*, respectfully requests this Honorable Court to grant Marvin D. Cutright's Petition for Writ of Certiorari to permit a resolution of important issues affecting not only Mr. Cutright, but all federal court reporters whose benefits have been or will be deprived by a government agency's improper denial of statutory, constitutional, and contractual rights.

Respectfully submitted,

STEPHEN M. JOSEPH
JOSEPH, ROBISON & ANDERSON, P.A.
209 East William, Suite 800
Wichita, Kansas 67202-4013
(316) 262-0667

Attorney for Amicus Curiae
United States Court
Reporters' Association

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In the Supreme Court of the United States

OCTOBER TERM, 1992

MARVIN D. CUTRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
JAMES M. KINSELLA
AGNES M. BROWN
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

25+1/0

QUESTION PRESENTED

Whether the Administrative Office of the United States Courts properly determined that petitioner was not entitled to benefits under the Annual and Sick Leave Act, 5 U.S.C. 6301, for the period of his employment as a court reporter prior to January 1984.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-1897

MARVIN D. CUTRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-10a) is reported at 953 F.2d 619. The decision of the Claims Court (Pet. App. 11a-27a) is reported at 21 Cl. Ct. 490.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1992. A petition for rehearing was denied on March 5, 1992. The petition for a writ of certiorari was filed on May 28, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner served as an official court reporter for the United States District Court for the Western District of Pennsylvania from August 30, 1958, until

his retirement on October 6, 1986. Pet. App. 2a, 68a. Shortly after retiring, petitioner sought payment for 2,976 hours of sick leave and 1,281 hours of annual leave allegedly accrued during his service from 1958 through 1986. *Id.* at 39a. He claimed that he was entitled to these benefits under the Annual and Sick Leave Act of 1951, 5 U.S.C. 6301 (Leave Act or Act).

Benefits under the Act are not payable to a "part-time employee who does not have an established regular tour of duty during the administrative work week." 5 U.S.C. 6301(2)(B)(ii). The Administrative Office of the United States Courts [1] accordingly informed petitioner that he would receive only those annual and sick leave benefits that accrued after January 8, 1984, because all court reporters were ineligible for Leave Act benefits prior to 1984. Pet. App. 14a. This position reflected the long-standing interpretation of the Act by the Administrative Office and the Comptroller General of the United States. See App., *infra*, 1a.

Prior to 1984, court reporters did not have fixed schedules. Their hours and duties fluctuated from day to day, which enabled them to accept work from private sources. Pet. App. 14a. Beginning in 1984, the Judicial Conference altered its policy toward court reporters [2] and for the first time made them eligible

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[1] The Administrative Office possesses the responsibility to "[s]upervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts." 28 U.S.C. 604(a)(1). The Administrative Office, in turn, operates under the supervision and direction of the Judicial Conference of the United States. 28 U.S.C. 604(a).

[2] Court reporters are appointed and employed by the district courts, subject to the supervision of the Judicial Conference. 28 U.S.C. 753.

to earn benefits under the Leave Act. Accordingly, those court reporters who agreed not to accept any free-lance work and who were placed on a regular tour of duty—*i.e.*, given fixed work hours that were specified in advance—began to accrue sick and annual leave benefits. See App., *infra*, 3a.

2. On March 15, 1988, petitioner filed suit in the Claims Court to recover benefit payments allegedly accrued from 1958 through 1984. Petitioner also moved for certification of this case as a class action. The Claims Court denied that motion. *Cutright* v. *United States*, 15 Cl. Ct. 576 (1988).

The parties then filed cross-motions for summary judgment. On October 3, 1990, the Claims Court granted petitioner's motion. The court ruled that he was a full-time employee and therefore did not fall within the exception in the Leave Act for part-time employees who do not have a regular tour of duty. Pet. App. 18a. The court granted petitioner's request for payment for unused leave, but limited his recovery to 240 hours of leave, as required by 5 U.S.C. 6304(a). Pet. App. 25a. Petitioner appealed this limit on his compensation, and the United States cross-appealed the Claims Court's judgment in favor of petitioner.

3. The court of appeals reversed. Pet. App. 1a-10a. The court held first that petitioner was a part-time employee. In reaching this holding, the court noted that prior to 1984 petitioner could take work from private sources whenever not in court; that when he took vacation, the court required him to hire his own replacement; and that although the government usually supplies equipment for full-time employees, under 28 U.S.C. 753(e), petitioner was specifically required to supply his own recording equipment. Pet. App. 5a.

The court then held that petitioner also lacked a regular tour of duty, which it noted was further proof that petitioner was a part-time employee. In so holding, the court observed that the district court did not require petitioner's services for 40 hours each week; that he came to the courthouse only when his services were needed and could leave when not in service; and that the court "did not exercise full-time supervision" over petitioner. Pet. App. 5a-6a. Based on its conclusion that from 1958 through 1983 petitioner was a part-time employee without a regular tour of duty, the court held that he was not entitled to Leave Act benefits for that period. *Id.* at 5a-6a.

ARGUMENT

The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is accordingly unwarranted.

1. The Annual and Sick Leave Act of 1951, 5 U.S.C. 6301, provides for the accrual by federal employees of annual and sick leave. The Act specifically excludes from coverage a "part-time employee who does not have an established regular tour of duty during the administrative workweek." 5 U.S.C. 6301 (2)(B)(ii). Petitioner contends that the court of appeals erred in concluding that prior to 1984 he was a part-time employee without a regular tour of duty, and was therefore ineligible to receive Leave Act benefits. The court of appeals' decision, however, is consistent with the long-standing interpretation of the agencies charged with the Act's enforcement, and prior judicial precedent.

a. Although the decisions of the Comptroller General are not binding upon this Court, it has long been

recognized that it is proper for courts to consider and accord appropriate deference to those decisions. See, *e.g.*, *Greene County Planning Bd.* v. *Federal Power Comm'n*, 559 F.2d 1227, 1242 (2d Cir. 1976). Cf. *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). For nearly 40 years, the Comptroller General unfailingly held that court reporters were not entitled to Leave Act benefits. As early as 1945, the Comptroller General determined that court reporters did not work according to fixed schedules, but rather worked only when the court needed their services. 25 Comp. Gen. 185, 187 (1945). The Comptroller General thus concluded that "the nature of the duties of court reporters is such as to be inconsistent with the granting of leave of absence with pay." *Id.* at 187-188.

The Comptroller General revisited this issue in 1974, in a case nearly identical to the present one. The court reporter in that instance claimed that he was a full-time employee, and to support his claim he pointed out that he was paid a fixed, annual salary. 54 Comp. Gen. 251, 256 (1974). The Comptroller General rejected his claim. In order to earn leave, the Comptroller General explained, an employee must have a regular tour of duty—*i.e.*, a "definite and certain time, day and/or hour of any day during the workweek" when the employee is unequivocally required to work. *Id.* at 257. Court reporters, by contrast, were required to work only when the court needed their services, and were otherwise free to practice their profession privately and thereby augment their income. *Id.* at 258. The Comptroller General thus found "no basis for concluding [that] the holding at 25 Comp. Gen. 185 (1945) is no longer applicable to court reporters." *Ibid.*

The decision of the court of appeals is also consistent with the interpretations of the Administrative

Office and the Judicial Conference, the offices charged with supervising court reporters. These agencies have consistently taken the position that prior to 1984 court reporters were excluded from coverage under the Leave Act.[3] App., *infra*, 1a. This interpretation in fact led the Judicial Conference in 1983 to alter the terms of court reporters' employment so that they could become eligible for Leave Act benefits under the terms of the statute. In that year, the Judicial Conference adopted the following resolution:

> Beginning with the 1984 leave year (effective January 8, 1984) a reporter who has been placed on a regular tour of duty consisting of a set number of work hours per week in the courthouse, specified in advance * * * is to earn annual leave in accordance with the Leave Act, 5 U.S.C. 6301 et. seq.

App., *infra*, 5a. This resolution enabled court reporters, for the first time, to earn Leave Act benefits.[4] Before the adoption of this resolution, however, the Administrative Office, the Judicial Conference and

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[3] Petitioner contends (Pet. 15) that the Administrative Office has admitted that the Leave Act always applied to court reporters. The 1983 memorandum to which he refers, however, concerned the applicability of the Leave Act to United States Magistrates, Bankruptcy Judges and the personal staff of circuit and district court judges. See Pet. App. 43a-51a. Despite petitioner's unsubstantiated assertion to the contrary, see Pet. 15, court reporters are not members of any judge's personal staff. Pursuant to the Court Reporters Act, 28 U.S.C. 753, court reporters work for a particular court, not a particular judge.

[4] Under the policy stated in the resolution, petitioner earned both sick leave and annual leave commencing in 1984. Pet. App. 14a; App., *infra*, 3a-4a.

the Comptroller General all concluded that court reporters were not entitled to Leave Act benefits.

b. The court of appeals' decision is also consistent with the decisions of the other courts that have considered this question. In *Lemily* v. *United States*, 418 F.2d 1337 (Ct. Cl. 1969), temporary relief deck officers and engineers sought Leave Act benefits. The employees were paid hourly, and did not have a fixed schedule, but they worked the annual equivalent of a 40-hour week. Like petitioner, the *Lemily* plaintiffs sought benefits based on the claim that a person who works the annual equivalent of a 40-hour week is, by definition, not a "part-time" employee under the Leave Act. The court rejected this argument:

> the full-time employee to whom the provisions of the 1951 Act are applicable is one regularly *required* to put in the standard workweek, not a when-actually-employed employee who *happens to work the annual equivalent of a 40-hour week.*

Id. at 1345 (emphasis added).

The *Lemily* court also clarified that a "regular tour of duty" represents "a specific period of time, regularly established in advance, during which an employee is unequivocally required to work." 418 F.2d at 1344. The court of appeals properly applied this analysis to the present case and determined that petitioner, in addition to being a part-time employee, did not have a regular tour of duty. He was not required to be at the courthouse for 40 hours each week; he came to the court only when his services were required; he was not supervised and could leave the courthouse when not in service; and his schedule fluctuated, depending on the needs of the court. Pet. App. 6a-7a. Regardless of the fact that petitioner may have worked the annual equivalent of a 40-hour

week, the court of appeals correctly concluded that he was a part-time employee without a regular tour of duty within the meaning of the Act.[5]

Petitioner relies on two cases in support of his argument that court reporters are full-time employees, *Cain* v. *United States*, 77 F.Supp. 505 (N.D. Ill. 1948), and *Sauer* v. *United States*, 354 F.2d 302 (Ct. Cl. 1965). Pet. 11-12. These two cases are inapposite to the present one. In *Cain*, the court held that a judge's personal secretary should not have been excluded from the Leave Act simply because her supervisor, an Article III judge, was excluded. The court found this exclusion improper because it did not fall within one of the enumerated exceptions contained in the Leave Act.

The court also rejected the Comptroller General's suggestion that judicial secretaries should be excluded because their duties are part-time and fluctuate. *Cain*, 77 F.Supp. at 507. Significantly, the court disagreed with the Comptroller General not over his interpretation of the Leave Act, but rather over the Act's application to judicial secretaries. As the judge in that case observed, his own secretary, as well as all other judges' secretaries in his district, "are obliged to observe a fixed schedule of attendance, being on duty every day from nine to five o'clock." *Ibid.* His Secretary thus was a traditional nine-to-five, full-time employee. Petitioner, on the other hand, was neither

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[5] Petitioner suggests (Pet. 18) that the United States conceded in response to interrogatories that he was not a part-time employee. This is incorrect. The United States has argued, as the court of appeals found (Pet. App. 9a), that petitioner was excluded from the Leave Act because he was a part-time employee *and* did not have a regularly scheduled tour of duty.

a member of a judge's personal staff nor required to work full time according to a fixed schedule. Unlike the judicial secretary in *Cain*, moreover, petitioner fits well within an enumerated exception to the Leave Act, namely that which excludes part-time employees without a regular tour of duty.

Sauer is similarly inapplicable to the facts of this case. In *Sauer*, the Court of Claims found that the Leave Act did not apply to a Court of Claims auditor. 354 F.2d at 305. Court of Claims auditors and court reporters represent very different job classifications, however. See 41 U.S.C. 114(a) (providing for the appointment of Court of Claims auditors for the purpose of "expediting the adjudication of termination claims"). For nearly four decades, the policy of the judiciary deemed that the Leave Act exception for part-time employees without a regular tour of duty was applicable to court reporters. That the Court of Claims determined that the exception was not applicable to Court of Claims auditors hardly diminishes the weight of authority holding the contrary with regard to court reporters.[6]

c. The court of appeals' decision is consistent not only with precedent but with congressional policy as well. If petitioner had been eligible for Leave Act benefits, and he did accept private work, on any given day that he was not in court petitioner might have received payment from three separate sources: (1) the private party for whom he did work; (2) the

[6] Amicus' reliance on *Goldhaber* v. *Foley*, 519 F. Supp. 466 (E.D. Pa. 1981), is equally misplaced. The court there examined the authority of Congress and the Administrative Office to appoint contract reporters to the bankruptcy court; it did not address the nature of the duties of district court reporters, nor did it at all suggest that district court reporters work according to a fixed schedule.

Leave Act; and (3) his salary as a court reporter. Surely Congress did not intend the Leave Act to provide a third source of income to such part-time employees. The court of appeals was correct to endorse the Comptroller General's conclusion that prior to 1984 the nature of a court reporter's duties was inconsistent with granting leaves of absence with pay. Pet. App. 6a.

2. Petitioner also contends that he has been deprived of property without due process of law. Pet. 21-23. However, "[t]he [Constitution's] procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits." *Board of Regents of State Colleges* v. *Roth*, 408 U.S. 564 (1972). As discussed above, between 1958 and 1984 petitioner did not acquire a property interest in leave benefits. He simply was not eligible for Leave Act benefits until January 1984, when he was placed upon a regular tour of duty by the district court. Because petitioner had no property interest, his argument that he was deprived of property without due process of law is without merit.

3. Petitioner contends that the court of appeals relied upon evidence outside the record in reaching its conclusion that he did not earn Leave Act benefits prior to 1984. Pet. 23-27. Specifically, petitioner objects to the court of appeals' suggestion that he was "free to take work from independent sources." Pet. 25. This information, however, was easily inferred from the Claims Court's following findings of fact:

> Plaintiff's work schedule was subject to the needs of the court. He was required to be available to report proceedings held by the court, often without advance notice. * * * [Plaintiff's] uncertain work schedule * * * invariably required him to

> work more than 40 hours one week, and less than 40 hours another.

Pet. App. 21a-22a.

The court of appeals did not state that petitioner in fact accepted work from outside sources, but rather that he was free to do so given the flexibility of his work schedule. Petitioner, in turn, did not object to the Claims Court's findings of fact, nor did he assert that he did not take work from independent sources. Petitioner's claim that the court of appeals relied upon evidence outside the record is therefore without merit.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

DAVID M. COHEN
JAMES M. KINSELLA
AGNES M. BROWN
Attorneys

JULY 1992

APPENDIX

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
Washington, D.C. 20544

March 3, 1987

L. Ralph Mecham
Director

James E. Macklin, Jr.
Deputy Director

R. Glenn Johnson
Chief of the
Division of Personnel

Mr. Marvin D. Cutright
Cutright, Lilienthal & Powers, Inc.
Certified Court Reporters
711 The Bigelow
Pittsburgh, Pennsylvania 15219

Dear Mr. Cutright:

Reference is made to your letter of January 29, 1987 in further support of your claim for 1084 hours of annual leave over that which is indicated by the official leave records maintained in the clerk's office.

While official court reporters are government "employees" within the meaning of the Leave Act, they do not earn annual sick leave because they do not "have an established regular tour of duty during the administrative workweek." 5 U.S.C., section 6301 (2)(ii). This has been the conclusion of both the Administrative Office and the Comptroller General of the United States for the past 42 years, essentially the entire time that the Court Reporter Act has ex-

isted. In September 1983, however, the Judicial Conference resolved that, beginning with the 1984 leave year (January 8, 1984), to [*sic*] those reporters who were placed on regular tours of duty with fixed hours specified in advance would earn annual leave under the Leave Act. This resolution in no way purported to alter the scope of the Leave Act; it merely authorized the courts to standardize their reporters' hours and liberate the reporters from the exception to the Leave Act that prevented their obtaining benefits. The Administrative Office merely took the steps necessary to carry out the Judicial Conference's resolution, including instructing the offices of the clerks of court to maintain official leave records for reporters who had been assigned regular tours of duty.

The leave records, as maintained by the clerk's office, are still the only accurate records and the only ones which we can honor. As indicated in our letter of January 12, 1937, if you will have the clerk's office send us an accurate SF 1150 reflecting 197 hours of annual leave and 234 hours of sick leave, we shall promptly process and pay you for your lump sum annual leave.

Sincerely yours,

/s/ Raymond J. Mealy
RAYMOND J. MEALY
Chief, Court Branch

cc: Chief Judge Cohill
Catherine Martrano, Clerk

January 12, 1987

Mr. Marvin D. Cutright
Cutright, Lilienthal & Powers, Inc.
Certified Court Reporters
711 The Bigelow
Pittsburgh, Pennsylvania 15219

Dear Mr. Cutright:

Reference is made to the Standard Form 1150, Record of Leave Data, which you recently sent to us. On this form, you indicated that, when you retired, you had an annual leave balance of 1281 hours and a sick leave balance of 2976 hours. According to the District Clerk's Office, which maintains your leave records, you only had 197 hours of annual leave and 284 hours of sick leave.

It appears that the difference is due to the fact that you computed your leave from the date of your initial appointment on August 30, 1958 and pro rated a higher leave rate since you worked more than 40 hours per week. Enclosed is a copy of the Administrative Office memorandum dated December 16, 1983 which established guidelines for providing annual leave for court reporters. As you will note, there were no provisions for retroactive credit and that the maximum accumulation was eight hours biweekly or 26 days (240 hours) per leave year. This maximum number of hours a pay period cannot be exceeded even if the hours worked exceeded 80 hours a pay period. The leave regulations only permit a prorated number of hours when the normal tour is less than full-time. The memorandum also indicated that the maximum annual leave accumulation that could be carried over to the next year was 240 hours, un-

less restored. Sick leave for full-time employees is earned at the rate of four hours per pay period with no maximum amount of accumulation. Under the guidelines contained in the Administrative Office's memorandum dated April 12, 1984 (copy enclosed) sick leave began accumulating the same date as did annual leave, or no earlier than the first pay period in January 1984.

In order that we may process your S.F. 115 and pay you for your unused accumulated annual leave, it will be necessary for us to receive a new form signed by the Clerks Office and reflecting the correct number of hours.

If you have any further questions in this regard, please contact Walter Simon of my staff at FTS 633-6060.

Sincerely yours,

RAYMOND J. MEALY
Chief, Court Branch

cc: Chief Judge Maurice B. Cohill, Jr.
Catherine C. Martrano, Clerk

Enclosures

WFS:tcg 1/9/87

DAYBOOK (CB)
WALTER SIMON
MR. MECHAM
JON LEETH

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
Washington, D.C. 20544

December 16, 1983

William E. Foley
Director

Joseph F. Spaniol, Jr.
Deputy Director

MEMORANDUM TO ALL:

Chief Judge, United States District Courts
District Court Executives
Clerks, United States District Courts
Court Reporters Supervisors
Court Reporters

SUBJECT:

Application of Leave Act to Provide Annual Leace for Court Reporters

The Judicial Conference in September 1983 adopted the following policy:

> Beginning with the 1984 leave year (effective January 8, 1984) a reporter who has been placed on a regular tour of duty consisting of a set number of work hours per week in the courthouse, specified in advance, during which hours the reporter may generate transcripts but may not perform any private (freelance) work of any kind, the reporter is to earn annual leave in accordance with the Leave Act, 5 U.S.C. 6301 et. seq. [*sic*]

For court reporters to earn annual leave, the court must state in its court reporter management plan

that reporters are assigned a regular tour of duty, and specify the regular hours of attendance. No annual leave is to be earned by reporters who are not assigned a regular tour of duty by the court.

Reporters who are assigned to a 40-hour per week tour of duty will earn the full amount of annual leave permitted by the Leave Act. Reporters who are assigned to a tour of duty consisting of fewer than 40 hours per week will earn annual leave on a pro rata basis. For example, a reporter assigned to a 20-hour per week tour of duty would earn one-half the amount of annual leave permitted by the Leave Act.

Reporters who are not covered by the Leave Act shall as heretofore provide substitutes at their own expense when taking vacations or leave for personal business, except for excused absences because of medical reasons. In this regard, reference is made to the resolution of the Judicial Conference of March 1982. (See Attachment A.)

IN THE UNITED STATES CLAIMS COURT

No. 172-88C

MARVIN D. CUTRIGHT, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

AFFIDAVIT

I, Catherine D. Martrano, Clerk of Court for the U.S. District Court, Western District of Pennsylvania, verify that, pursuant to the resolution of the Judicial Conference in September 1983, and in accordance with the action taken by the Board of Judges of this court on January 9, 1984, the official court reporters of this court were placed on the Leave System effective January 9, 1984. Since that date, the leave records maintained by the Clerk for all court employees have included annual and sick leave records for all of the official court reporters.

On October 3, 1986, Marvin D. Cutright, Official Court Reporter, retired and the leave records kept on his behalf in the Clerk's Office showed balances of 197 annual hours and 284 sick hours at the time of his separation. A Record of Leave Data (SF 1150) containing Mr. Cutright's final leave balances, as taken from the records of the Clerk's Office, was mailed to the Personnel Division of the Administrative Office on April 2, 1987.

Upon the information available to me, I declare under penalty of perjury that the information provided in this affidavit is true and correct.

/s/ Catherine D. Martrano
CATHERINE D. MARTRANO
Clerk of Court
September 19, 1989

(Original affidavit submitted with the Government's Cross Motion for Summary Judgment, September 27, 1989, *Marvin D. Cutright v. United States*, Cl. Ct. 172-88C.)

BEST AVAILABLE COPY

* U.S. GOVERNMENT PRINTING OFFICE: 1978—781-168/514

ORIGINAL TO A.O.
COPY TO MARVIN
4-2-87 USIA

RECORD OF LEAVE DATA

1. Name (Last, First, Middle)	2. Social Security Number	3. (For agency use)
Cutright, Marvin D.	198-24-0237	

4. Date and Nature of Separation	5. A. Subject to 5 U.S.C. 6304(f) (45 day leave ceiling)	Yes	No
10-03-86 Retirement	B. Last Date Subject to 5 U.S.C. 6304(f)	C. Annual Leave Balance as of That Date (Hours)	

6. Total Service for Leave (as of Date of Separation)	XXX	More than 15 Years			
		Less Than 15 Years (show)	Years	Months	Days

SUMMARY OF ANNUAL AND SICK LEAVE

	MO.	DAY	YEAR	HOURS Annual	Sick	Restored
7. Carryover Balance From Prior Leave Year Ending	01	03	87	214	208	--
8. Current Leave Year Accrual Through Pay Period Ending (if 90 day restriction applicable, explain in remarks)	09	27	87	152	76	
9. Total				366	284	
10. Reduction in Credits, If Any (current year)				--	--	
11. Total Leave Taken, Current Year Through Date of Separation				169	-0-	
12. Balance				197	284	
13. Total Hours Paid in Lump Sum (Includes _____ hours for holidays)						

14. Salary Rate(s) Per Hour:

15. Lump Sum Leave Dates (if part-time tour, explain in Remarks)		MO.	DAY	YEAR	HOURS
	From				
	Thru				
a. Restored	From				
	Thru				
b. Annual Leave Above Ceiling	From				
	Thru				
c. Annual Leave Within Ceiling	From				
	Thru				

ABSENCE WITHOUT PAY

16. During Leave Year in Which Separated	Hours

17. A. Date of Last Equivalent Increase	MO.	DAY	YEAR

B. Total AWOP Hours Since Last Equivalent Increase (except during military service and while in receipt of OWCP payments)	Hours

SUMMARY OF HOME LEAVE

18. Basic Service Period of 24 Months of Continuous Service Abroad:	MO.	DAY	YEAR
Date Started			
Date Completed			

19. Current 12 Months Accrual Period Began on	MO.	DAY	YEAR

Hours Absent Without Pay Since That Date →

20. Current Balance (or accrual) as of	MO.	DAY	YEAR

Number of Days →

21. Twelve Months Accrual Date as of Date of Separation
Number of Days →

22. Dates Leave Used Prior 24 Months

FROM MO.	FROM DAY	FROM YEAR	TO MO.	TO DAY	TO YEAR

MILITARY LEAVE

23. During Current Calendar Year

	FROM MO.	FROM DAY	FROM YEAR	TO MO.	TO DAY	TO YEAR
A. Regular—Active Duty or Training						
B. Special—Civil Disturbance						

24. Remarks (include shore leave information, if applicable):

This form submitted in order to replace the returned SF 1150 form signed by Chief Judge Cohill on 12-10-86. A letter from the Chief of the Court Branch accompanied the returned SF 1150 form stating that the clerk's office maintained the official leave records for Mr. Cutright, and that since the 12-10-86 1150 form did not reflect the balances in the clerk's office, it could not be processed.

6a

25. Certified Correct By: (Signature)	26. Title, Agency, Address, Telephone Number	27. Date
Catherine Martrano	Catherine Martrano, Clerk of Court P.O. Box 1805, Pgh. Pa. 15230	03-25-87

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